



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

3rd Report, 2012 (Session 4)

Stage 1 Report on the Criminal Cases (Punishment and Review) (Scotland) Bill

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The Scottish Parliament
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Justice Committee

Remit and membership

Remit:

To consider and report on:

- a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice; and
- b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Roderick Campbell
John Finnie
Christine Grahame (Convener)
Colin Keir
Jenny Marra (Deputy Convener)
Alison McInnes
David McLetchie
Graeme Pearson
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Peter McGrath
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Andrew Proudfoot
Christine Lambourne



The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee

3rd Report, 2012 (Session 4)

Stage 1 Report on the Criminal Cases (Punishment and Review) (Scotland) Bill

The Committee reports to the Parliament as follows—

PREFACE-RECENT EVENTS IN RELATION TO PART 2 OF THE BILL

1. On Sunday 25 March, a Scottish newspaper published online a document it described as the statement of reasons in the Megrahi case. The newspaper said that it was doing so because it had received Megrahi's permission and because it was in the public interest to do so. It also indicated that these factors provided a robust legal case for disclosure should data protection concerns be raised. It indicated that it had made a very few redactions to protect the names of confidential sources and private information.¹ The Scottish Criminal Cases Review Commission has confirmed that, whilst it has not considered the document in detail, it appears at first impressions to be the statement of reasons in the Megrahi case.² This online publication occurred three days before the Committee was due to agree this report. The Committee notes that this is a hugely significant development, given the policy intentions behind Part 2 of the Bill. We have sought, at this very late stage, to take account of it in the text of the report. However, we also consider that it is important that we place our consideration of the evidence received before the Parliament in full. In this regard, it is worth underlining that, whatever the main intentions behind Part 2, it is drafted in general terms and may still be relied upon in future cases. The Committee also wishes to make clear that we are in principle firmly on the side of openness and transparency in relation to the Megrahi statement of reasons and have always wished to see it published in as complete a state as is legally possible.

¹ The Committee has had no opportunity to consider the online document but notes that the online document, which is a PDF, runs to 802 pages. Previous indications were that the statement of reasons was 821 pages long.

² <http://www.sccrc.org.uk/ViewFile.aspx?id=544> [Accessed 28 March 2012]

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

General

2. The Committee supports the general principles of the Bill (see paragraphs 94 and 134).

3. The Committee appreciates that the policy aims behind both Parts of the Bill are perhaps unusually narrow for an Executive Bill but still considers that the Scottish Government might have benefited from consulting more widely before introduction.

Part 1 – punishment part of non-mandatory life sentences

4. The Committee is supportive of the aim of Part 1 of the Bill in seeking to address the anomaly identified in the *Petch and Foye* case whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime.

5. The Committee accepts that the existing legislative framework on non-mandatory life sentences is already a complex area of law. However, we also note the difference of views between the Scottish Government, which considers the Bill to provide a clear framework for judges to use when calculating the punishment part of non-mandatory life sentences, and those expert witnesses who consider the legislation overly complex. These views are difficult to reconcile. It may be that the Bill is acceptable in the interim to rectify an anomaly that has arisen at short notice. To that extent the Committee is supportive of the general principles of Part 1 of the Bill. The Committee returns to possible long-term solutions later in this report.

6. The Committee seeks an assurance from the Scottish Government that procedures are in place so that victims and witnesses are able to fully understand what the sentences handed down by the courts mean in practice.

7. On the basis of the evidence received, the Committee is generally satisfied that the proposals in Part 1 of the Bill are ECHR-compliant. However, we are not certain whether the possibility of double-counting (discussed further below) might give rise to difficulties in relating to the requirement for comparative justice under the ECHR.

8. The Committee invites the Scottish Government to consider whether the potential for “double counting” under section 2B(5) referred to by witnesses at Stage 1 give rise to any concerns. The Committee also notes the Faculty of Advocate’s views as to potential ambiguity in the drafting of section 2A(2).

9. The Committee is attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at Stage 1. Following the assurance from the SHRC that it believes these approaches to be ECHR compliant, the Committee invites the Scottish Government to consider whether a less prescriptive approach would be clearer and more appropriate.

10. The Committee seeks an update from the Scottish Government on when the relevant sentencing provisions in the Custodial Sentencing and Weapons (Scotland) Act 2007 will be brought into force.

Part 2 –disclosure of information obtained by Scottish Criminal Cases Review Commission

General points

11. The Committee recognises that publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose as it is unlikely to resolve all outstanding issues. However, we are supportive in principle of there being as much openness as possible about the reasons why Megrahi was allowed to make his appeal.

12. The Committee also notes that the Bill is in general terms and may apply in future to cases other than that of Megrahi. However, the main policy aim behind the Bill has been to facilitate the publication of the statement of reasons pertaining to that case. The Committee invites the Scottish Government to consider whether recent events provide an opportunity to consider whether the Bill's provisions are robust enough to apply in circumstances other than the Megrahi case.

13. Whilst the Committee notes that the intended main purpose of Part 2 appears to have been superseded, the Committee supports there being as much openness as possible in relation to abandoned appeals arising from a reference from the SCCRC, subject to there being a substantial public interest. The Committee therefore supports the general principles of Part 2 of the Bill, but recognises that there has been very little opportunity to take evidence on the general applicability of Part 2.

Provisions in the Bill

14. Following recent events, the Committee notes that the question whether the SCCRC is the appropriate body to undertake (a) the administrative process of preparing the Megrahi statement of reasons for publication, and (b) the final decision whether to publish the statement (or a redacted version of it) may have been superseded by events.

15. However, the Committee is clear that the SCCRC would generally be the appropriate body to undertake the administrative process envisaged under Part 2 of the Bill.

16. In relation to the final decision-making process, the Committee notes the SCCRC's evidence that it would have been willing to take the decision to publish the Megrahi statement given the appropriate legal tools. The Committee invites the Scottish Government to consider whether it would be of benefit, for future cases, if the factors the SCCRC should take into account in determining whether to disclose information should be expressly set out (whether in the Bill or, for instance, in guidance from the Scottish Ministers.) If so, it appears to the Committee that the public interest should be a key consideration.

17. The Committee broadly welcomes the provisions in Part 2 relating to the notification of interested and affected parties and notes, in particular, the

Information Commissioner's view that they may help ensure that information is disclosed in compliance with data protection requirements.

18. In relation to information emanating from foreign authorities under international agreements, the Committee notes that the Bill in effect gives the authority a veto power over the disclosure of such information. This might be considered contrary to the principles underlying Part 2, but the Committee accepts that the inclusion of such a provision may be practically unavoidable.

19. The Committee notes that the Bill makes it possible for the SCCRC to publish an incomplete statement of reasons, but requires the SCCRC to make this expressly clear, as well as to explain the context in which information is being disclosed. This appears to be a measured approach. On the other hand, questions would be raised about the disclosure of a statement that has been substantially redacted, given the aim of openness and transparency that lies behind Part 2 of the Bill. We also note the SCCRC's comments that they would be unlikely to publish the Megrahi statement if, following redaction, it had become "unbalanced" and recommend that similar reasoning should be applied in any future cases.

Data protection and other potential obstacles to disclosure

20. The Committee notes the recent publication of a redacted version of the Megrahi statement of reasons by a Scottish newspaper, but considers it useful to set out our conclusions on the applicability of data protection law to the SCCRC.

21. The Committee is not persuaded by the argument that any data protection obstacles could have been avoided through the Cabinet Secretary for Justice exercising an order-making power rather than introducing a Bill. The legal position is clear: the Parliament does not have the power to override data protection law whether by primary or secondary legislation.

22. The Committee notes the emergence of an apparent consensus among key stakeholders that one of the conditions permitting the lawful disclosure of personal data and sensitive personal data (that the processing is necessary for the administration of justice) may be applicable. This would permit the publication of information in the statement of reasons whether or not consent was obtained. If this is ultimately accepted, then an order enabling disclosure from the UK Secretary of State for Justice would not be necessary.

23. The Committee invites the Scottish Government to clarify whether it considers there would be any legal benefit or disbenefit, in terms of data protection law, in altering the current test to be applied by the SCCRC in determining whether to publish a statement of reasons (for instance by providing that this is, under certain circumstances, a duty rather a power).

24. The Committee notes that if the SCCRC acted in compliance with the data protection principles in releasing information, this does not necessarily mean that human rights considerations would not arise. This would need to be taken account of particularly in circumstances where the SCCRC disclosed sensitive personal data without express consent. However, the Committee has no reason to believe that this is an insurmountable legal difficulty.

25. The Committee invites the Scottish Government to consider the points raised by the SCCRC on legal professional privilege and on whether it would be possible to competently address this within the Bill.

Delegated powers in the Bill

26. The Committee notes that there are two competing views on the scope of section 2(2), which concerns the power to amend primary legislation on sentencing by subordinate legislation. The Committee recommends that the Scottish Government give further consideration to the drafting of this provision prior to Stage 2.

Financial aspects of the Bill

27. The Committee would welcome a response from the Scottish Government to the financial concerns raised by the SCCRC, and on whether the Scottish Government considers that these have been superseded by recent events.

INTRODUCTION

28. The Criminal Cases (Punishment and Review) (Scotland) Bill³ was introduced on 30 November 2012 by Kenny MacAskill MSP, Cabinet Secretary for Justice, and was referred to the Justice Committee for Stage 1 consideration. It has also been considered by the Finance Committee and Subordinate Legislation Committee.

29. The Bill deals with two distinct issues.⁴

30. Part 1 of the Bill amends the rules about the punishment part of non-mandatory life sentences imposed in criminal cases. This is considered necessary by the Scottish Government to address an issue arising from the March 2011 Appeal Court judgement, *Petch and Foye v HM Advocate*. This concerned the time Morris Petch⁵ and Robert Foye⁶ must serve in prison before they become eligible to apply for parole.

31. Part 2 of the Bill amends Part XA of the Criminal Procedure (Scotland) Act 1995. This is in order to set out a procedure for enabling the disclosure of information obtained by the Scottish Criminal Cases Review Commission (SCCRC) in circumstances where an appeal against conviction has been abandoned or has otherwise fallen following an SCCRC referral to the appeal court. Although the reforms being proposed in Part 2 are of general effect, the

³ Criminal Cases (Punishment and Review) (Scotland) Bill, as introduced (SP Bill 5, Session 4 (2011)). Available at:

[http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20\(Punishment%20and%20Review\)%20\(Scotland\)%20Bill/Bill_as_introduced.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Bill_as_introduced.pdf)

⁴ The Bill also has a Part 3, containing standard provisions on commencement and short title, which do not require to be commented upon.

⁵ Morris Petch was found guilty of two charges of rape in 2007 and sentenced to (discretionary) life imprisonment.

⁶ Robert Foye pled guilty to a charge of rape in 2008 and was given an Order for Lifelong Restriction.

Policy Memorandum⁷ makes clear that the changes are in response to the case of Abdelbaset Al-Megrahi, convicted in 2001 for the Lockerbie bombing.

Overall structure of Bill

32. The Committee notes that the Scottish Government has brought forward these two very disparate issues in a single Bill. The Committee notes that such an approach is not unprecedented in Scottish Parliament legislation and can sometimes be justified on pragmatic grounds (eg scheduling of legislation). However it does have the potential to create some handling difficulties when the legislation is being considered. One witness also deprecated the practice of combining different provisions on different matters in one Act on the ground that “it makes life more difficult for anyone trying to find the law on any matter.” The Committee has some sympathy with this view.

Policy memorandum and pre-introduction consultation on the Bill

33. Under Rule 9.6.3 of Standing Orders, the Committee is required to report on the Bill’s Policy Memorandum.

34. The Committee considers the Policy Memorandum to provide an adequate explanation of the policy intentions behind both main Parts of the Bill.

Consultation

35. The Policy Memorandum must comment on any consultation prior to the Bill being introduced. Unusually for a non-emergency Executive Bill, there was no formal consultation on the content of either Part. In relation to Part 1, the Bill’s Policy Memorandum said that the provisions were intended—

“to put back in place policy that existed prior to the Petch and Foye judgement being made in March 2011. As such, the provisions do not implement new policy, but rather respond very specifically to the terms of a judgement.”⁸

36. In relation to Part 2, the Scottish Government indicated that it did not consider consultation to be necessary because it has repeatedly been clear as to its legislative intentions in relation to the Megrahi case. The Scottish Government stated, however, that it informally consulted the SCCRC.

37. The Committee appreciates that the policy aims behind both Parts of the Bill are perhaps unusually narrow for an Executive Bill but still considers that the Scottish Government might have benefited from consulting more widely before introduction. This is particularly the case given (a) concerns over the complexity of the drafting of Part 1 and (b) uncertainty over the impact of data protection law in relation to Part 2 (both issues discussed later). Experts from

⁷ Criminal Cases (Punishment and Review) (Scotland) Bill. Policy Memorandum (SP Bill 5-PM, Session 4 (2011)), paragraph 5. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20\(Punishment%20and%20Review\)%20\(Scotland\)%20Bill/Policy_Memo.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Policy_Memo.pdf)

⁸ Policy Memorandum, paragraph 66.

outside the Scottish Government may have been able to assist it on these issues before the Bill was introduced.

Parliamentary scrutiny at Stage 1

38. On 6 December 2011, the Parliamentary Bureau agreed to refer the Bill to the Justice Committee as lead committee at Stage 1.

39. The Finance Committee agreed at its meeting on 22 December to adopt level one scrutiny in relation to the Financial Memorandum of this Bill. This is applied where there appears to be minimal additional costs as a result of the legislation and means that the Finance Committee does not take oral evidence or produce a report. However, it does seek written evidence from affected organisations. Written submissions from those invited to the Finance Committee are set out in Annexe A. The financial impact of the Bill is considered towards the end of the report.

40. The Subordinate Legislation Committee considered the delegated powers provisions in the Bill at Stage 1 at its meetings on 24 January and 7 February 2012. The Subordinate Legislation Committee's report is attached at Annexe B and the issues it raises are also considered near the end of the report.

Justice Committee consultation

Approach and call for evidence

41. The Committee issued a call for written evidence on 6 December 2011 and received nine submissions and five supplementary submissions.⁹ The Committee took further evidence over three meetings in January and February 2012 from:

- the Law Society of Scotland (Michael Meehan, Member of the Criminal Law Committee, giving evidence only on Part 1);
- the Faculty of Advocates (James Wolffe QC and Joanna Cherry QC, giving evidence almost exclusively on Part 1);
- the Scottish Criminal Cases Review Commission (Gerard Sinclair, Chief Executive, and Michael Walker, Senior Legal Officer, giving evidence exclusively on Part 2);
- Justice for Megrahi (Robert Forrester, Iain McKie, Len Murray, and Dr Jim Swire, giving evidence exclusively on Part 2);
- Sir Gerald Gordon QC (giving evidence on both Parts: Sir Gerald is a former sheriff, temporary judge and Member of the SCCRC, and author of a leading textbook on Scots criminal law);
- James Chalmers, Senior Lecturer, University of Edinburgh School of Law (giving evidence mainly on Part 1 but also on Part 2, in relation to which he helpfully went on to provide additional written evidence);

⁹ Full details of written submission are given in Annexe E.

- the Information Commissioner's Office (Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), giving evidence only on Part 2); and
- the Cabinet Secretary for Justice, giving evidence of course on both Parts.¹⁰

42. Lord McNally from the UK Ministry of Justice was invited to give evidence on data protection issues relating to Part 2. He could not attend in person but provided written evidence.

43. The Committee is very grateful to all those who took the time to provide evidence on the Bill.

PART 1

44. Part 1 of the Bill would amend section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”) and section 20 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“the 2007 Act”).¹¹ The Scottish Government explain that these amendments—

“will resolve a technical anomaly which arose following the Appeal Court's judgement in the case of *Petch and Foye v. HMA*, which meant that prisoners given a discretionary life sentence or Order for Lifelong Restriction (OLR) can apply to become eligible for parole earlier than those serving sentences of a fixed length. Under this new legislation the courts will regain the discretion to set a 'punishment part' of those sentences that it considers appropriate in all the circumstances of a particular case.”¹²

45. Amendments to the two Acts are necessary because section 20 of the 2007 Act, which will supersede section 2 of the 1993 Act, has yet to come into force. The Bill's Explanatory Notes indicate that the intention is to repeal Part 1 of the 1993 Act once Part 1 of the 2007 Act is brought into force.¹³

The current sentencing system

46. Custodial sentences can be grouped under three categories:

- determinate sentences;
- mandatory life sentences; and

¹⁰ Full details of witnesses are given in Annexe D.

¹¹ The Bill amends both the 1993 Act and the 2007 Act because section 2 of the 1993 Act is due to be replaced by section 20 of the 2007 Act once the relevant provisions of that statute come into force.

¹² Scottish Government: Criminal Cases (Punishment and Review) (Scotland) Bill homepage. Available at: <http://www.scotland.gov.uk/Topics/Justice/law/ccbill> [Accessed 2 March 2012]

¹³ Criminal Cases (Punishment and Review) (Scotland) Bill. Explanatory Notes (SP Bill 5-EN, Session 4 (2011)), paragraph 16. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20\(Punishment%20and%20Review\)%20\(Scotland\)%20Bill/Ex_Notes_and_FM.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf)

- non-mandatory life sentences.

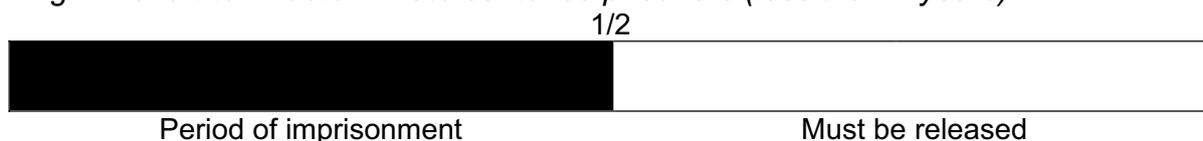
47. Although the Bill deals specifically with the punishment part of non-mandatory life sentences, it may be useful for the reader to have an overview of all custodial sentencing options as all three categories are referred to later in the report. (Below, and later in the discussion of Part 1, a set of bar graphs are provided to aid understanding. The length of the whole bar indicates the whole sentence, though, as will become clear in the course of the discussion, in many cases the “whole sentence” is more of a notional sentence rather than something that would ever actually be served.)

Determinate sentences

48. Determinate (or fixed term) sentences are currently split into short and long term sentences.¹⁴

49. A short term sentence is one of less than four years. Prisoners sentenced to less than four years are entitled to automatic and unconditional release half-way through their sentences. The Parole Board therefore has “no role in determining whether or not individuals are released into the community”¹⁵.

Fig 1 – short term determinate sentence prisoners (less than 4 years):



50. A sentence of four years or more is considered a long term sentence. Such prisoners are eligible to apply for parole half-way through their sentence and must be released after serving two-thirds of their sentence. Unlike short term prisoners, long term prisoners are released on licence,¹⁶ the conditions of which are set by the Parole Board.

Fig 2 – long term determinate sentence prisoners (4 years or greater):



51. James Chalmers, Senior Lecturer at the University of Edinburgh School of Law, outlined how courts set a determinate sentence—

“This sentence does not differentiate between any part imposed for the purposes of retribution and deterrence and any part imposed for the protection of the public.¹⁷ The baseline for determining such a sentence is

¹⁴ The release arrangements for fixed term sentences will change when the relevant provisions of the 2007 Act are brought into force.

¹⁵ The Parole Board for Scotland. *Sentence Type*. Available at: http://www.scottishparoleboard.gov.uk/page/sentence_type [Accessed 9 February 2012]

¹⁶ The licence generally continues until the end of the whole determinate sentence.

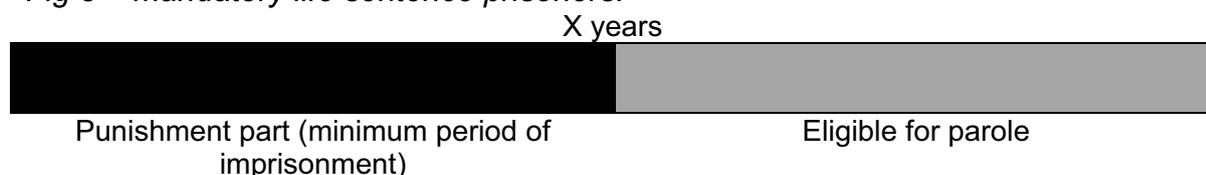
¹⁷ The 2007 Act will require the courts to clearly identify a part of the whole determinate sentence which is appropriate for retribution and deterrence alone – to be called the ‘custody part’.

the requirements of retribution and deterrence in a given case, but it may be necessary to impose a higher sentence than those requirements would suggest because of the risk presented to the public by the offender.”¹⁸

Mandatory life sentences

52. A mandatory life sentence is imposed “for an offence in relation to which a life sentence is required by law (i.e. in relation to murder)”¹⁹. When a life sentence is imposed, the court sets a punishment part which must be served in its entirety before the prisoner is eligible for parole. Once the punishment part of the sentence has been served the Parole Board will decide if the prisoner should be released on life licence. Where the prisoner is not released, the prisoner’s continued detention is reviewed at regular intervals.

Fig 3 – mandatory life sentence prisoners:



53. The punishment part of a sentence is described in section 2 of the 1993 Act as what the court “considers appropriate to satisfy the requirements for retribution and deterrence (ignoring the period of confinement, if any, which may be necessary for the protection of the public)”²⁰. The length of the punishment part of a mandatory life sentence is calculated by the court taking into account the seriousness of the offence, any previous convictions and whether there has been an early guilty plea.

Non-mandatory life sentences

54. Non-mandatory life sentences cover two specific sentencing options which are available to the courts.

55. The first option is an Order for Lifelong Restriction (OLR). The Criminal Procedure (Scotland) Act 1995 (as amended by the Criminal Justice (Scotland) Act 2003) defines the criteria for which an OLR might be given—

“the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.”²¹

56. An OLR is therefore designed to ensure that “offenders, after having served an adequate period in prison to meet the requirements of punishment, do not

¹⁸ James Chalmers. Written submission, paragraph 5.

¹⁹ Scottish Parliament Information Centre. (2012) *Criminal Cases (Punishment and Review) (Scotland) Bill: Custodial Sentences*. SPICe Briefing 12/08, page 4. Available at: http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_12-08_.pdf

²⁰ Prisoners and Criminal Proceedings (Scotland) Act 1993. Available at: <http://www.legislation.gov.uk/ukpga/1993/9/contents> [Accessed 10 February 2012]

²¹ Criminal Procedure (Scotland) Act 1995. Available at: <http://www.legislation.gov.uk/ukpga/1995/46/contents> [Accessed 10 February 2012]

present an unacceptable risk to public safety once they are released into the community.”²²

57. The second form of a non-mandatory life sentence is known as a discretionary life sentence. While similar to an OLR in that it is intended to protect the public from high risk offenders, the monitoring and supervisory regime is less restrictive than under an OLR sentence.²³

58. Discretionary life sentences have a long history in the Scottish legal system.²⁴ OLRs were only introduced in 2006.²⁵ The policy memorandum states that since the latter were introduced, “courts have generally tended to impose OLR sentences instead of discretionary life sentences for relevant high risk offenders.”²⁶

59. When calculating the punishment part of either type of non-mandatory life sentence, the court is directed to take into account the same three factors applicable to mandatory life sentences; the seriousness of the offence, any previous convictions and whether there has been an early guilty plea. However, the court is also required to take into account “a number of factors which effectively require it to consider the approach it would have taken if imposing a determinate custodial sentence”²⁷.

60. Section 2 of the 1993 Act provides that these are:

- the length of custodial sentence it would have considered appropriate if imposing a determinate sentence;
- the part of that determinate sentence which it considers would have satisfied the requirements for retribution and deterrence (ignoring any period of confinement which may have been necessary for the protection of the public); and
- the proportion of the retribution and deterrence part which a determinate sentence prisoner “would or might” serve in custody prior to early release under the provisions in section 1 of the 1993 Act.²⁸

61. The interpretation of these statutory provisions has proved to be challenging for the courts.

²² Policy Memorandum, paragraph 7.

²³ Policy Memorandum, paragraph 7.

²⁴ Scottish Government. (1999) *Life Sentence Prisoners in Scotland*. Available at: <http://www.scotland.gov.uk/Publications/1999/05/ee951c69-5631-4322-a3f9-d33837d34433/Q/pno/2> [Accessed 10 February 2012]

²⁵ While legislated for in the Criminal Justice (Scotland) Act 2003, OLRs were commenced by the Criminal Justice (Scotland) Act 2003 (Commencement No. 9) Order 2006. Available at: <http://www.legislation.gov.uk/ssi/2006/332/contents/made> [Accessed 7 March 2011]

²⁶ Policy Memorandum, paragraph 7.

²⁷ SPICe Briefing 12/08, page 4.

²⁸ SPICe Briefing 12/08, page 5.

Difficulties arising from interpreting current legislation

62. There have been a number of appeals in relation to the interpretation of section 2 of the 1993 Act when calculating the punishment part of non-mandatory life sentences, including *O'Neill v HMA (1999)*²⁹ and *Ansari v HMA (2002)*³⁰. The *O'Neill* appeal led to section 2 of the 1993 Act being amended in the Convention Rights Compliance (Scotland) Act 2001 while *Ansari*, which at the time maintained the status quo, was a majority decision of a five judge bench. Lord Reed's dissenting opinion in *Ansari* was later considered the correct one by the majority of the seven judge bench in the *Petch and Foye*³¹ case.

The Petch and Foye case

63. The *Petch and Foye* appeal again centred on the court's interpretation of the 1993 Act when determining the punishment part of a non-mandatory life sentence. Prior to the decision in *Petch and Foye*, a commentator summarised the state of the relevant law as—

“something of a mess. It has to be said that this is largely due to the statutory wording itself. Just what factors must (and must not) be taken into account when fixing the punishment part? What weighting is to be given to the relevant factors? What comparisons (if any) are to be made with determinate sentences? What discounts are to be made and for what elements? Is it appropriate to second-guess the view of the Parole Board? These are just some of the points which await decision.”³²

64. The subsequent judgement in March 2011 resulted in the punishment parts of both of the appellants' sentences being reduced (from 12 to 8 years in *Petch's* case, from 9 years to 4 years, 6 months in *Foye's* case).

65. Lord Justice General Hamilton observed that, as a result of the reasoning applied by the majority in the case (to which he belonged), a person sentenced to a non-mandatory life sentence—

“could become eligible for parole at an earlier stage than a determinate sentence prisoner sentenced for the same crime, because of the need to strip out the element of public protection from the notional determinate sentence.”

66. It is important to stress that, despite now being eligible for parole at an earlier date, both prisoners will still be required to satisfy the Parole Board that they “no longer pose a high risk to public safety”³³ before they can be considered for release. However the result clearly appears to be anomalous.

²⁹ High Court of Justiciary. (1999) *O'Neill v Her Majesty's Advocate*. Available at: <http://www.scotcourts.gov.uk/opinions/C59198.html> [Accessed 14 February 2012]

³⁰ High Court of Justiciary. (2002) *Ansari v Her Majesty's Advocate*. Available at: http://www.scotcourts.gov.uk/opinions/C94_02.html [Accessed 14 February 2012]

³¹ High Court of Justiciary. (2011) *Petch and Foye v Her Majesty's Advocate*. Available at: <http://www.scotcourts.gov.uk/opinions/2011HCJAC20.html> [Accessed 14 February 2012]

³² Sheriff Charles Stoddart, *The Journal*, 15 February 2010. *Big decisions*. Available at: <http://www.journalonline.co.uk/Magazine/55-2/1007589.aspx> [Accessed 13 February 2012]

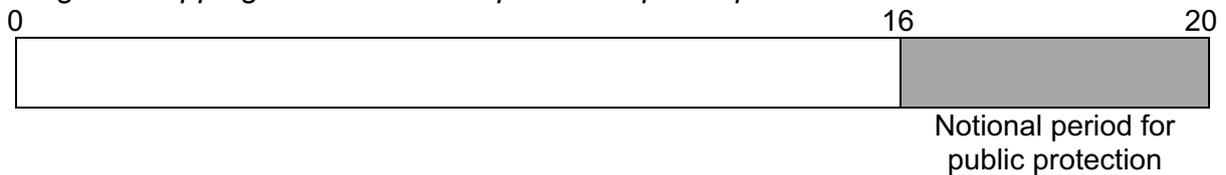
³³ Policy Memorandum, paragraph 10.

67. The Petch and Foye judgement requires courts to use a three-step approach in the application of section 2 of the 1993 Act. It also determines that other provisions in that section should not be used to depart from the punishment part identified by the application of the three steps. The following indicates the reasoning now to be applied, taking the case of Morris Petch as an example. (To repeat; the punishment part of his original discretionary life sentence was set at 12 years.)

68. Following *Petch and Foye*, step 1 is to set the equivalent determinate sentence that Petch would have received had he not received a life sentence. The court determined that this was 20 years.³⁴

69. Step 2 is to strip out the part of that notional determinate sentence which would have been imposed for public protection. For Petch, the Appeal Court considered this to be a period of 4 years.

Fig 4 – stripping out the notional period for public protection:



70. The third and final step is to then reduce by half the notional punishment part of the sentence to take into account early release provisions for the equivalent determinate sentence.

Fig 5 – discretionary life sentence imposed on Petch following the ruling in *Petch and Foye*:



71. However, had Petch originally been given a 20 year determinate sentence, he would only have been eligible for parole after a minimum of 10 years (although he would have had to be released between one-half and two-thirds of his sentence).

Fig 6 – equivalent determinate sentence of 20 years:



72. This is where the anomaly lies. As Lord Justice General Hamilton, in concluding his opinion, said—

³⁴ High Court of Justiciary. (2011) *Petch v Her Majesty's Advocate*. Available at: <http://www.scotcourts.gov.uk/opinions/2011HCJAC50.html> [Accessed 15 February 2012]

“I have accordingly come, with regret, to the view that, however unsatisfactory it may appear as a matter of comparative justice, Parliament has given statutory effect to an arrangement under which an indeterminate prisoner will, or at least may, become first eligible for consideration for parole at an earlier stage in his sentence than an equivalent determinate prisoner. If this situation is to be remedied, it is for Parliament to remedy it. The divisions of opinion expressed judicially in these appeals would suggest that a clear, well-considered legislative solution is called for.”³⁵

Purpose of the Part 1

73. Part 1 of the Bill seeks to amend the statutory rules used by courts when calculating the punishment part of a non-mandatory life sentence. In effect, it seeks to reverse the *Petch and Foye* judgment.

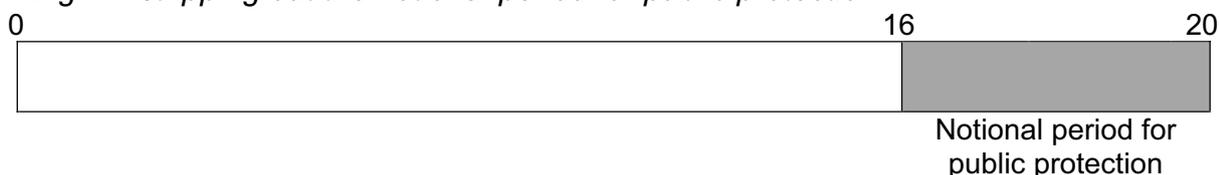
74. The Policy Memorandum states that the aim of the Bill is to require the court to “set a proportion of that [punishment] period that is equal to one half of the notional determinate sentence, having stripped out the elements of public protection. ... However, the Bill also provides the court with the power to increase that period up to the whole of the punishment element of the notional determinate sentence in cases where the seriousness of the offence, the previous convictions of the offender or other relevant factors, make that appropriate.”³⁶

Illustrative example

75. Under the Bill, courts would be given discretion to set the punishment part between one-half and the whole of the punitive period (ie the part excluding any period required for public protection) of the equivalent notional determinate sentence.

76. The approach envisaged under the Bill is as follows. The court begins by setting a notional sentence for an equivalent determinate sentence rather than the life sentence that the convicted person has in fact been given. Taking as an example the notional equivalent sentence applied to Petch in his appeal, this is set at 20 years. From this, the court strips out a period to reflect a notional period for public protection, say (again following the decision in the Petch appeal) 4 years. This leaves a figure of 16 years.

Fig 7 – stripping out the notional period for public protection:



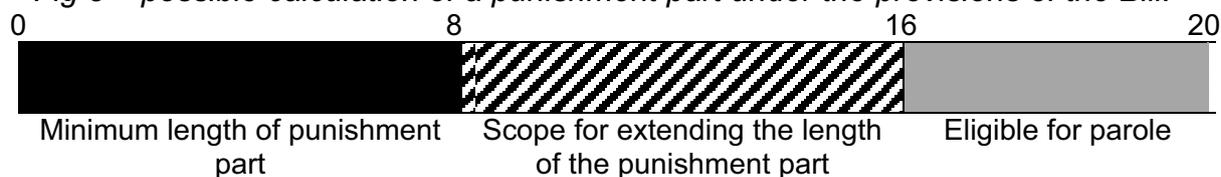
77. The second step (and where the approach would begin to differ from the Petch and Foye decision) is for the court to set a minimum period of imprisonment for the non-mandatory life sentence prisoner (ie the punishment part). This may be anywhere between one-half (8 years) and all (16 years) of the notional stripped

³⁵ High Court of Justiciary. (2011) *Petch & Foye v HM Advocate*. Available at: <http://www.scotcourts.gov.uk/opinions/2011HCJAC20.html> [Accessed 3 March 2012]

³⁶ Policy Memorandum, paragraph 33.

down punitive period set under the first step, taking into account factors such as the seriousness of the crime and any previous convictions of the prisoner.

Fig 8 – possible calculation of a punishment part under the provisions of the Bill:



78. Although not directly covered in the Bill, the Committee also understands that there can be a third step of applying a sentence discount for a guilty plea (where relevant).³⁷ The question of whether a discount is always appropriate in response to an early guilty plea was raised with the Cabinet Secretary for Justice. In his response, the Cabinet Secretary referred to a recent opinion³⁸ by the Lord Justice Clerk who “pronounced that he did not see the discount as necessarily being automatically available.”³⁹

Evidence received on the Bill

Underlying aim of Part 1

79. The Bill’s Policy Memorandum refers to the Petch and Foye judgment having produced an “anomaly”⁴⁰ and says that the legislation will—

“reassure the public by providing courts with discretion to determine that discretionary life sentence prisoners and OLR sentence prisoners will only become eligible to apply for parole at a point when the court considers they have served an appropriate period of imprisonment to satisfy the need for punishment of the offender.”⁴¹

80. Witnesses were generally welcoming of the underlying aim of Part 1. The Association of Chief Police Officers in Scotland considered that Part 1 of the Bill appeared to be “a fair way to approach the issue”,⁴² while James Chalmers of the University of Edinburgh’s School of Law, who raised a number of concerns with regard to the approach taken in Part 1, nevertheless described it as “tolerable as an interim means of addressing the difficulty identified in *Petch and Foye*.”⁴³

³⁷ Section 196 of the Criminal Procedure (Scotland) Act 1995 provides the statutory authority for sentencers to consider whether to reduce the length of a sentence as a result of a guilty plea by the accused. Available at: <http://www.legislation.gov.uk/ukpga/1995/46/section/196> [Accessed 20 March 2012]

³⁸ High Court of Justiciary. (2011) *James Kelly and Others v Her Majesty’s Advocate*1. Available at: <http://www.scotcourts.gov.uk/opinions/2011HCJAC129.html> [Accessed 20 March 2012]

³⁹ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 951.

⁴⁰ Policy Memorandum, paragraph 34.

⁴¹ Policy Memorandum, paragraph 3.

⁴² The Association of Chief Police Officers in Scotland. Written submission.

⁴³ James Chalmers. Written submission, paragraph 10.

81. The Law Society of Scotland, which also questioned whether the Bill would in fact effectively remedy the anomaly found in *Petch and Foye*, nevertheless said that it recognised that the Bill is “seeking to provide such a remedy.”⁴⁴

82. In evidence, the Cabinet Secretary for Justice acknowledged that the Bill “is meant to be an immediate fix to *Petch and Foye*”⁴⁵, rather than seeking to address the structure of custodial sentences more broadly. He said that the Scottish Government took the view that “given the clear problems caused by the *Petch and Foye* decision, we needed an immediate solution.”

83. Putting to one side the merits of the legislative approach taken in Part 1 (discussed below), **the Committee is supportive of the aim of Part 1 of the Bill in seeking to address the anomaly identified in *Petch and Foye* whereby a life prisoner is likely to have a parole hearing earlier than a non-life prisoner sentenced for a similar crime.**

Interpretation and perceived complexity of the Bill

84. Much of the evidence received by the Committee in relation to Part 1 of the Bill centred on how it would be interpreted and how its provisions would be applied in practice. The Bill has given rise to some difficulties in these areas.

85. In its written submission, the Faculty of Advocates referred to the complexity of existing law and said that the proposed amendments to the 1993 Act “address the perceived problem not by revisiting the structure of the existing legislation but by further elaboration on it.” James Wolffe QC characterised the approach of the Bill as being to “take an already complex piece of legislation and make it even more complex.”⁴⁶ Sir Gerald Gordon expressed similar views.⁴⁷

86. The Law Society of Scotland also questioned whether the Bill “will result in a clear legislative solution to this difficult and complex issue.”⁴⁸

Public confidence and clarity in sentencing

87. Joanna Cherry QC, who appeared in *Petch v HMA* as Advocate Depute, referred to the tortuous judicial history of existing legislation and its tendency to divide judicial opinion. She added that—

“it is not just lay people who find the legislation extremely difficult to understand. It gave rise to the most difficult statutory interpretation of my career—colleagues who were involved in the case in question would agree with me about that. I am sure that it is an issue for the Parliament that legislation should be readily understandable to the public, particularly legislation to do with the sentencing of prisoners who have been convicted of the most serious crimes—other than murder, of course. That is a strong factor in our concern about the bill’s complexity.”⁴⁹

⁴⁴ The Law Society of Scotland. Written submission.

⁴⁵ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 945.

⁴⁶ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 864.

⁴⁷ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 917.

⁴⁸ The Law Society of Scotland. Written submission.

⁴⁹ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 865.

88. This issue was also pursued by her colleague Mr Wolffe, who noted that

“sentencing judges are expected to explain sentences in a way that will be intelligible not only to the accused who is being punished and sentenced, but to the victims of the crime, the public at large and, ultimately, the appeal court. It is open to question, at least, whether provisions of such complexity will be helpful to sentencing judges in the task that they must carry out, and I invite the committee to question those who are responsible for the bill about that.”⁵⁰

89. James Chalmers considered that the Bill “seeks to create a tortuous system which is barely intelligible to lawyers, let alone the general public.”⁵¹ He said that had had not spoken to anyone who had felt comfortable reading it and in working out what judges were required to do under it.⁵²

90. Underlying these general comments appeared to be a view that the Bill imposes an unnecessarily rigid approach (proposed simpler alternatives are discussed later) and, in particular, that the requirement to calculate a parallel notional sentence pertaining to a set of circumstances that did not in fact occur (ie the setting of a determinate sentence) was inherently unsatisfactory. Michael Meehan of the Law Society told the Committee that—

“The bill complicates matters by requiring judges not only to consider the sentence that they will impose but to conduct a parallel notional sentence exercise. In other words, they will almost have to be like computers with dual processors: they will have to consider not only the discretionary life sentence but what they might have done had they gone down another route. That is where things begin to get complicated. First of all, they will have to work out a different type of disposal and then try to compare the two. The exercises are different because, of course, the paramount consideration in cases with a discretionary life sentence element is protection of the public. No matter whether we are talking about a discretionary life sentence or an order for lifelong restriction, that is what is at the forefront of one’s mind with regard to what is a relatively rare disposal.”⁵³

91. The Cabinet Secretary for Justice told the Committee—

“We accept that this is a complex area of law, but we do not think that the provisions are unnecessarily complex. They exist within a context and they seek to address a specific issue.”⁵⁴

92. He added that the Scottish Government believed the Bill—

“provides a clear framework within which judges must calculate the punishment part of a non-mandatory life sentence. We are making the law easier to understand. The provisions provide clear limits within which the

⁵⁰ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 864

⁵¹ James Chalmers. Written submission, paragraph 10.

⁵² Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 915.

⁵³ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 866

⁵⁴ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 942

judge can set the punishment part, and they seek to remove the areas of uncertainty that gave rise to the *Petch and Foye* decision.”⁵⁵

93. Mr MacAskill also remarked that it is the role of the Judicial Studies Committee, which is responsible for judicial training in Scotland, to explain the legislation to the judiciary.

Conclusions

94. **The Committee accepts that the existing legislative framework on non-mandatory life sentences is already a complex area of law. However, we also note the difference of views between the Scottish Government, which considers the Bill to provide a clear framework for judges to use when calculating the punishment part of non-mandatory life sentences, and those expert witnesses who consider the legislation overly complex. These views are difficult to reconcile. It may be that the Bill is acceptable in the interim to rectify an anomaly that has arisen at short notice. To that extent the Committee is supportive of the general principles of Part 1 of the Bill. The Committee returns to possible long-term solutions later in this report.**

95. **The Committee seeks an assurance from the Scottish Government that procedures are in place so that victims and witnesses are able to fully understand what the sentences handed down by the courts mean in practice.**

ECHR compliance and comparative justice

96. The decision in *Petch and Foye* was based on the interpretation of the 1993 Act itself, rather than detailed consideration of relevant provisions of the European Convention of Human Rights (ECHR). However, ECHR case law does stand in the background, setting some requirements for any approach to calculating the punishment part of non-mandatory life sentences that have influenced both statute law and its interpretation by the courts

97. The first strand of case law originates from the European Court of Human Rights decision in the English case of *Thynne, Wilson and Gunnell v United Kingdom (1990)*, which was subsequently given effect to in Scotland by section 2 of the 1993 Act. The outcome of the 1990 case is summarised in the Policy Memorandum—

“it was held that non-mandatory life sentences imposed by English courts were composed of a ‘punitive’ element and subsequently of a ‘security’ element. In respect of the security element of such a sentence, the European Court of Human Rights found that the applicants were entitled under Article 5(4) of the Convention ‘to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of any re-detention determined by a court’. The Parole Board had been held to have the status of a court for these purposes, and gradually, the power to direct the release of prisoners has moved from the

⁵⁵ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 943.

Scottish Ministers to the Parole Board itself, whose decisions are now binding on the Scottish Ministers.”⁵⁶

98. The second strand of ECHR case law concerns comparative justice; specifically that the calculation of the punishment part of a non-mandatory life sentence should be linked (although not necessarily identical) to the period a determinate sentence prisoner would have to serve in custody before being released under early release provisions.⁵⁷ The requirement to ensure comparative justice is in essence the aim of Part 1 of the Bill (and has been covered in more detail above), as a prisoner sentenced to non-mandatory life imprisonment can currently become eligible for consideration for parole at an earlier stage than a prisoner given a determinate sentence for a like crime.

99. While the Committee has not received much evidence arguing that the Bill’s proposals may not be ECHR compliant (although see the issue of double counting below), the issue of ECHR compliance has been raised with regard to some of the alternative proposals submitted by witnesses (see below).

100. The Policy Memorandum states that the proposals in Part 1 of the Bill are compatible with the Article 5(4)⁵⁸ for two reasons—

“First, it is not possible for the sentencing court to include factors relating to public protection (i.e. those which properly form part of the ‘security’ element mentioned above) in the assessment of the punishment part. Therefore there is no possibility that a discretionary life prisoner could be detained beyond the part of their sentence that can be attributed to deterrence and retribution without recourse to the Parole Board to have the lawfulness of their detention challenged. Second, the Parole Board itself has been held to be a ‘court’ for the purposes of Article 5, meaning that the discretionary life sentence prisoner, having served the punishment part of their sentence, has their detention examined by a body that satisfies the requirements of Article 5(4).”⁵⁹

101. During his appearance before the Committee, the Cabinet Secretary for Justice gave further justification of the Bill’s compliance with ECHR—

“We must accept that ECHR law makes it clear that the security aspect is separate from the punishment part and should not be included in it. We formally accept that. Non-mandatory life sentences are not given routinely, as is shown by the fact that there have been 75 in six years. It is necessary to take account of the ECHR. Equally, we have to look at our domestic law and

⁵⁶ Policy Memorandum, paragraph 13.

⁵⁷ European Court of Human Rights. (2010) *Cliff v The United Kingdom*. Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871179&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> [Accessed 21 March 2012]

High Court of Justiciary. (2011) *Petch and Foye v Her Majesty’s Advocate*. Available at: <http://www.scotcourts.gov.uk/opinions/2011HCJAC20.html> [Accessed 14 February 2012]

⁵⁸ Article 5(4): Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

⁵⁹ Policy Memorandum, paragraph 72.

consider how to get an element of parity between a non-mandatory life sentence and the determinate sentence that would be given. It is not an either/or situation—it is both.”⁶⁰

102. Following the evidence session with Mr MacAskill, the Committee wrote to the Scottish Human Rights Commission to seek its view on whether or not Part 1 of the Bill is ECHR compliant. In its response,⁶¹ the SHRC outlined the current human rights framework relating to life sentences. The SCHR concluded that the proposals set out in Part 1 of the Bill are “consistent with current ECHR jurisprudence” but that an “apparent potential for ‘double-counting’ (i.e. considering the same set of factors at two stages of the determination of a sentence) may raise ECHR concerns”. This caveat would appear to concern the second strand of ECHR case law as outlined above.

103. On the basis of the evidence received, the Committee is generally satisfied that the proposals in Part 1 of the Bill are ECHR-compliant. However, we are not certain whether the possibility of double-counting (discussed further below) might give rise to difficulties in relating to the requirement for comparative justice under the ECHR.

“Double-counting” and other discrete drafting issues

104. Some witnesses highlighted the potential for inappropriate “double-counting” in the provisions of the Bill which seek to provide the judiciary with more discretion in setting the length of the punishment part.

105. Their observations concern proposed new section 2B(5) of the 1993 Act, which sets out the grounds upon which the court may set the punishment part of a non-mandatory life sentence at more than one-half of the notional equivalent (stripped down) determinate sentence. The specified grounds are the seriousness of the offence; whether the offence was committed while the offender was serving a period of imprisonment for another offence; and any previous convictions. These are similar to the criteria to be used to determine the length of the overall notional determinate sentence. In other words, it appears that the same set of factors that had been used to set a notional equivalent determinate sentence longer than is the “norm” for a particular offence (thus making for a longer minimum period of imprisonment) could then be used again to lengthen the minimum period of imprisonment of that extended sentence longer than is the norm.

106. The Law Society considered that this approach was “unfair and amounts to double-counting”⁶² and could therefore be open to appeal. This concern was also raised by the Faculty of Advocates and Sir Gerald Gordon, who said—

“On any view, I am unhappy with the proposed s2B(5). Subparas (a) and (c) are surely matters to be taken into account in determining the punishment

⁶⁰ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 947

⁶¹ http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120309_SHRC_to_CG.pdf

[Accessed 28 Mar 2012]

⁶² The Law Society of Scotland. Written submission.

part itself, being factors which would be relevant whether or not an OLR was being imposed.”⁶³

107. The SHRC was asked whether this apparent potential for double-counting may raise an ECHR concern. The SHRC was (as noted above) not able to give a definitive answer—

“Given the complexity of the proposed procedure and the lack of clarity as to how the provisions would be interpreted, the Commission finds it difficult to address this issue without further investigation.”⁶⁴

108. A separate drafting issue was raised in the written evidence of the Faculty of Advocates, concerning the setting of a notional determinate sentence under new section 2A(2)(a). The Faculty suggested that there is an ambiguity in the drafting which may lead to the element of the sentence imposed for public protection effectively being removed twice. It describes this as an “apparent internal contradiction” which “illustrates that the proposed amendments do not deal with the root reason for the ‘anomaly’”.

109. The Committee invites the Scottish Government to consider whether the potential for “double counting” under section 2B(5) referred to by witnesses at Stage 1 give rise to any concerns. The Committee also notes the Faculty of Advocate’s views as to potential ambiguity in the drafting of section 2A(2).

Alternative approaches

110. As mentioned above, a number of witnesses have suggested alternative approaches to meet the broad aims of the Bill.

111. The Law Society proposed that the statutory requirement to strip out an element for public protection, from the notional equivalent determinate sentence used for the purposes of comparative justice, should be removed.⁶⁵ This was on the basis that the requirement was not needed (the final punishment part would still need to exclude any period required for public protection) and had led to the anomaly identified in *Petch and Foye*. In the Law Society’s subsequent appearance before the Committee, Michael Meehan responded to a question on whether its proposal was ECHR compatible—

“It would depend on how the sentencer articulated what he or she did. If the sentencer were to say, “I have apportioned a discrete element to protection of the public,” that could offend the convention, albeit that the convention requires comparative sentences as opposed to absolute parity. However, in the Law Society’s submission, we make the point that protection of the public is an issue that runs through the sentencing exercise and is not regarded as some minority or discrete element.”⁶⁶

⁶³ Sir Gerald Gordon. Written submission.

⁶⁴ http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120309_SHRC_to_CG.pdf
[Accessed 28 Mar 2012]

⁶⁵ The Law Society of Scotland. Written submission.

⁶⁶ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 873.

112. Sir Gerald Gordon considered that those given a non-mandatory life sentence should simply be entitled to apply for parole at the same time as those serving an equivalent determinate sentence.⁶⁷ However, Sir Gerald said he was not sure whether such an approach would be ECHR compatible.⁶⁸ The Faculty proposed a similar sentencing method as an example of an alternative legislative approach in its written submission.⁶⁹

113. James Chalmers suggested that—

“If the legislation simply said—and did no more than say—that the sentencing judge was required to set a punishment part, that would be sufficient in terms of ECHR compliance. The judge would still be required to conduct the exercise of comparative justice and comply with convention requirements, but they might not have to jump through so many hoops to get there.”⁷⁰

114. James Wolffe QC made a similar point on behalf of the Faculty (which continually highlighted in its evidence the importance of sentencing judges having suitable discretion when imposing sentences)—

“we are questioning the extent to which it is necessary for that [parallel sentencing exercise based on determinate sentences] to be prescribed in a relatively rigid, step-by-step way instead of leaving it to experienced judges to do [it] anyway. After all, if they get it wrong, they will be corrected by the appeal court.”⁷¹

115. In its letter to the SHRC on whether or not it considers the Bill as it stands to be ECHR compliant, the Committee also sought its view on whether these alternative approaches would be compliant. In its response, the SHRC said that it considered the alternative approaches suggested by the Law Society, the Faculty of Advocates, Sir Gerald Gordon QC and James Chalmers “would also be consistent with current ECHR jurisprudence.”⁷²

116. The Committee is attracted by the relative simplicity of alternative approaches to the drafting of Part 1 proposed by some witnesses at Stage 1. Following the assurance from the SHRC that it believes these approaches to be ECHR compliant, the Committee invites the Scottish Government to consider whether a less prescriptive approach would be clearer and more appropriate.

Overhaul of sentencing law

117. Part 1 of the Bill would make changes to both the Prisoners and Criminal Proceedings (Scotland) Act 1993 and relevant sections of the Custodial Sentencing and Weapons (Scotland) Act 2007. This is because the custodial sentence provisions of the more recent piece of legislation, which will (amongst

⁶⁷ Sir Gerald Gordon. Written submission, paragraph 5.

⁶⁸ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 920.

⁶⁹ Faculty of Advocates. Written submission, paragraph 6.

⁷⁰ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 918.

⁷¹ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 867.

⁷² http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120309_SHRC_to_CG.pdf
[Accessed 28 Mar 2012]

other things) supersede section 2 of the 1993 Act, have yet to come into force. The Policy Memorandum of the Custodial Sentencing and Weapons (Scotland) Bill provides the policy objectives of the custodial sentencing provisions—

“These provisions deliver the Scottish Executive’s commitments to end automatic and unconditional early release of offenders (as provided presently by the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as amended)) and to achieve greater clarity in sentencing.”

118. James Chalmers described current determinate sentencing law as “unprincipled and incoherent”⁷³ while the Law Society said that—

“With fixed-period sentences, there is not that clarity [about how long the person must serve in prison]. If one had an overall review and removed that provision [automatic early release], there would be parity within the legislation.”⁷⁴

119. On the general issue of confidence in sentencing Michael Meehan, for the Law Society of Scotland said that—

“it can cause some difficulty if a disposal is given in court that is hard to understand or for which there is no apparent reasoning. As for complainers and victims, the Procurator Fiscal Service has in the High Court and sheriff courts a victim information service, which can explain to persons affected by crime what has happened. Having been advocate deputes at various times, all three of us—Joanna Cherry, James Wolffe and myself—have made a point of explaining things to family members or complainers afterwards. Although that can be—and certainly is—done, the question is whether it would be better simply to deliver sentences in an understandable way.”⁷⁵

120. In the Bill’s Policy Memorandum, the Scottish Government said that while consideration was given to whether limited commencement of the 2007 Act could achieve the desired policy aim, it concluded that—

“the policy intention in this case is to address an issue arising out of the operation of the 1993 Act, rather than to bring the provisions of the 2007 Act into force. Also, the approach we have taken is to give discretion to court to specify, if the court considers it appropriate in the circumstances of a case, that up to all of the punishment part of the notional determinate sentence must be served before an offender is eligible to apply for parole. In the 2007 Act, an upper limit of three-quarters of the punishment part of the notional determinate sentence is established. Therefore, commencement of the 2007 Act would not have delivered our policy aim in full and therefore it was not pursued.”⁷⁶

121. The Committee recognises that the Bill’s aim is to address a specific issue arising out of the *Petch and Foye* judgement, but we acknowledge the concerns

⁷³ James Chalmers. Written submission, paragraph 7.

⁷⁴ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 869.

⁷⁵ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 866.

⁷⁶ Policy Memorandum, paragraph 61.

raised during evidence about the perceived problems with sentencing law more generally, in particular automatic early release of determinate sentence prisoners. While recognising that the Custodial Sentencing and Weapons (Scotland) Act may not mitigate all of the concerns raised by witnesses on sentencing law, the Committee notes that a law passed in 2007 with the aim of making sentencing clearer and more principled has not yet been brought into force, with no apparent commencement date yet proposed.

122. The Committee seeks an update from the Scottish Government on when the relevant sentencing provisions in the Custodial Sentencing and Weapons (Scotland) Act 2007 will be brought into force.

PART 2

Introduction

123. Part 2 of the Bill concerns the Scottish Criminal Cases Review Commission. The main role of the SCCRC is to review and investigate Scottish criminal cases where it is alleged that a miscarriage of justice may have occurred. Following investigation, the SCCRC may refer a case to the appeal court of the High Court of Justiciary for reconsideration. Part 2 makes one main change to the SCCRC's functions: it provides a framework to enable the SCCRC to determine whether to disclose information about cases it has referred to the High Court, where the subsequent appeal has been abandoned.

124. The Policy Memorandum accompanying the Bill on introduction stated that although the provisions of Part 2 were in general terms, they had been brought forward in response to the case of Abdelbaset Al Megrahi, the man convicted in 2001 of the Lockerbie bombing. The SCCRC considered that there may have been a miscarriage in that case and in 2007 referred it to the High Court. In 2009, Megrahi abandoned his appeal when it was at a very early stage. He was shortly afterwards granted compassionate release from prison and returned to Libya.

125. In each case where it considers that there may have been a miscarriage of justice, the SCCRC is required to give to the Court a statement of their reasons for making the reference and to provide copies of it to any likely party to future appeal proceedings.⁷⁷ It is known that the statement in the Megrahi case runs to 821 pages⁷⁸ (not including annexes). Because Megrahi abandoned his appeal at an early stage, hardly any of the information in the statement of reasons was recited in open court. The SCCRC considers that it is not able within the current law to disclose any information in the statement.

126. It is important to stress that the SCCRC does not have a general power to make a statement of reasons public where an appeal is not abandoned. In most cases the SCCRC is legally prohibited from disclosing any statement.⁷⁹ However, where an appeal proceeds in the normal way, it is to be expected that any significant information in the statement supporting the contention that the original

⁷⁷ Criminal Procedure (Scotland) Act 1995, section 194D(4). Available at: <http://www.legislation.gov.uk/ukpga/1995/46/contents> [Accessed 26 March 2012]

⁷⁸ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 879.

⁷⁹ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 882.

case was wrongly decided would be disclosed in open court. In that way, the most important parts of the statement might be expected to enter the public domain, because they would be recited in the court's judgment or reported by the media.⁸⁰ The early abandonment of the Megrahi appeal meant that this never happened.

The events at Lockerbie and the Megrahi case

127. In evidence before the Committee, the Cabinet Secretary for Justice said that the Bill was required in order to enable the Scottish Government to be "as open and transparent as can be"⁸¹ in relation to the Megrahi case, echoing words used in the policy memorandum.⁸² However (as discussed later) he also noted the general wording of the Bill and its potential to apply in future cases. The Committee notes that such cases are likely to be rare.⁸³

128. Recent events (as alluded to at the beginning of this report) means that much of the evidence that the Committee took now appears to be less relevant than it was when it was provided. However, the Committee considers it important to set out our consideration of all the main issues discussed at Part 2.

129. Inasmuch as the evidence recited below relates to the specifics of the Megrahi case, it is important to make clear that the Committee saw its role as simply being to test the provisions of Part 2 against the Scottish Government's view that they amounted to the best means available to them to help bring to light facts about the case in the hands of the SCCRC. It was to help answer this question – and not to speak to their doubts about the conviction – that we agreed that one of the groups invited to give evidence should be the organisation Justice for Megrahi.

130. The Committee has all along recognised that publication of the statement of reasons in the Megrahi case would serve a relatively limited purpose. It may not bring any significant sense of resolution to those most closely affected by the case, and is unlikely to be seen as ending the debate over the original trial. The question as to what the ultimate outcome should be is not a question for the Committee to answer as part of our scrutiny of this Bill.

131. That said, the Committee also recognises the public interest in the Megrahi case, and the widespread sense of dissatisfaction that early abandonment of the appeal meant that key findings in the statement of reasons were never fully enunciated or tested in court. To reiterate comments made at the beginning of this report, the Committee supports there being greater openness about the reasons behind the appeal and to that extent was supportive of the original aims behind Part 2. We are supportive of as much of the statement of reasons as is possible being in the public domain.

⁸⁰ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Cols 926-927.

⁸¹ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 957.

⁸² Policy memorandum, paragraph 4.

⁸³ There have been three instances of abandoned appeals since the SCCRC was set up in 1999 (including Megrahi's); Financial Memorandum, paragraph 54. No evidence has been led to suggest that, if the Bill were agreed to, there would be any move to publish the statements of reasons in those two other cases.

132. **The Committee recognises that publication of the statement of reasons in the Megrahi case might serve a relatively limited purpose as it is unlikely to resolve all outstanding issues. However, we are supportive in principle of there being as much openness as possible about the reasons why Megrahi was allowed to make his appeal.**

133. **The Committee also notes that the Bill is in general terms and may apply in future to cases other than that of Megrahi. However, the main policy aim behind the Bill has been to facilitate the publication of the statement of reasons pertaining to that case. The Committee invites the Scottish Government to consider whether recent events provide an opportunity to consider whether the Bill's provisions are robust enough to apply in circumstances other than the Megrahi case.**

134. **Whilst the Committee notes that the intended main purpose of Part 2 appears to have been superseded, the Committee supports there being as much openness as possible in relation to abandoned appeals arising from a reference from the SCCRC, subject to there being a substantial public interest. The Committee therefore supports the general principles of Part 2 of the Bill, but recognises that there has been very little opportunity to take evidence on the general applicability of Part 2.**

Posthumous appeal

135. A consensus emerged during evidence-taking that it would be legally possible for Megrahi's abandoned appeal to be taken up again after his death. In a statement to the Chamber on 29 February, the Cabinet Secretary noted that if an application for such an appeal were made, the SCCRC would need to decide whether to make a referral and the High Court would need to determine whether to take it.⁸⁴ The Committee notes that if an appeal proceeds, the SCCRC would be empowered to disclose information for the purpose of any criminal proceedings to any person likely to be a party to proceedings.⁸⁵

136. We also note that the current test for the SCCRC, in deciding whether to refer an appeal, is to consider whether it is in the interests of justice that a reference should be made. In so doing, it must also have regard to the need for finality and certainty in the determination of criminal proceedings.⁸⁶ The High Court currently applies a similar test in determining whether to accept the reference.⁸⁷ In relation to the Megrahi case, the Committee is not clear how either body might be expected to apply this test in the context of an appeal on behalf of a deceased person, where the offence occurred a quarter century or more ago.⁸⁸ The Committee is not clear, either, whether the fact that the statement has now been published, with the main findings widely discussed in the media, would affect the decision-making process of either body on this issue.

⁸⁴ The Scottish Parliament. *Official Report, 29 February 2012.*

⁸⁵ Section 194D(4)(a) of the Criminal Procedure (Scotland) Act 1995.

⁸⁶ Section 194C of the Criminal Procedure (Scotland) Act 1995.

⁸⁷ Section 194DA of the Criminal Procedure (Scotland) Act 1995.

⁸⁸ The Committee notes that Lord Carloway has recently recommended removing these tests. (*The Carloway Review, Report and Recommendations*, 17 November 2011.)

137. Justice for Megrahi indicated to the Committee that an application for a posthumous appeal should be expected in due course.⁸⁹

138. If an appeal were to proceed, this could potentially have provided an alternative means of bringing to light key findings in the statement of reasons had the statement not been published anyway on 25 March 2012. This issue now seems to be academic. However the Committee wishes to make clear that we saw the issue of a posthumous appeal as ultimately irrelevant to our Stage 1 consideration before the online publication of the Megrahi statement, as there is no guarantee as to whether and when an appeal might proceed.

Current legal position and changes made by the Bill

Current legal position

139. Part 2 of the Bill inserts six new sections into Part XA of the Criminal Procedure (Scotland) Act 1995, which sets out the role and functions of the SCCRC. It is section 194J of the 1995 Act that currently sets out the general prohibition: it is an offence for a Member or employee of the SCCRC (or former Member or employee) to disclose information obtained by the SCCRC in the exercise of its functions. Section 194K makes some exceptions to this, one of which is that the information is disclosed “in any statement or report required by this Act”. The Act provides that the SCCRC is to provide the statement of reasons to the High Court, with a copy going to any likely party to appeal proceedings. The Committee understands that in practice this is interpreted to mean that the SCCRC should disclose the statement to these persons and to no one else.

The 2009 order

140. Another exception in section 194K, at subsection (1)(f), is the provision that information may be disclosed “in any circumstances in which the disclosure of information is permitted by an order made by the Secretary of State” (to be read, in the light of the Scotland Act, as a reference to the Scottish Ministers).

141. In 2009, the Scottish Parliament agreed to an instrument⁹⁰ laid by virtue of section 194K(1)(f), providing a framework for the SCCRC to disclose information if certain conditions are met. As with the Bill, the instrument was drafted in general terms but the Scottish Government made clear that it was drafted in order to enable disclosure of the Megrahi statement. The instrument would have permitted the SCCRC to disclose information on the statement of reasons relating to an abandoned appeal provided any person who provided the information (whether directly or indirectly) had consented to its disclosure.

142. On 9 December 2009, the SCCRC issued a press release⁹¹ indicating that, after nine months of correspondence and discussion with interested parties, it had “become obvious that there is no likelihood of obtaining the unqualified consent required in terms of the 2009 Order”. This had led the SCCRC to decide to

⁸⁹ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Cols 906-907.

⁹⁰ The Scottish Criminal Cases Review Commission (Permitted Disclosure of Information) Order 2009. Available at: <http://www.legislation.gov.uk/ssi/2009/448/contents/made> [Accessed 26 March 2012]

⁹¹ <http://www.sccrc.org.uk/viewfile.aspx?id=487> [Accessed 26 March 2012]

discontinue the process. The SCCRC indicated that it would be happy to revisit the matter if the requirement to obtain the consent of parties were removed.

143. It would have been open to the Scottish Government to seek to lay another order. However the Scottish Government chose to go down the route of primary legislation. It set out its reasons for this in the Policy Memorandum,⁹² the primary one appearing to the Committee to be that “Parliament should have full scrutiny powers over the proposed framework for the Commission.”

144. The Bill takes the opportunity to revoke the 2009 Order, on the ground that it is superseded by Part 2.

Provisions in the Bill: new exception permitting disclosure

145. New section 194M inserted by the Bill would create a new exception to the general prohibition on disclosure. Information may be disclosed if—

- it relates to a case that the Commission has referred to the High Court for reconsideration (other than where it is the sentence only that the Commission is asking the Court to reconsider),
- the subsequent appeal has fallen or been abandoned, and
- the Commission determines that it is appropriate in the whole circumstances for the information to be disclosed.

The test to be applied by the SCCRC

146. Questions arose at Stage 1 as to whether the SCCRC was, in principle, the appropriate body to apply the test set out in the third of the bullet points listed above. It appears to the Committee that this test amounts to a discretion rather than a duty to disclose (if the other conditions are met). Questions have arisen as to what sort of factors the SCCRC would in practice take into account in exercising that discretion, and whether it is they who ought to have the discretion.

147. Sir Gerald Gordon, who is a former Member of the SCCRC, remarked that it had been set up—

“to decide whether a case should be referred to the High Court. The decision whether or not to publish the SoR [ie statement of reasons in the Megrahi case] is a political one and should be decided by politicians. Nor am I happy about partial publication, or about requiring the SCCRC to explain why it has done what it did.⁹³ This brings me back to the point about this being a political decision: it is for politicians to decide and to explain their decision.”⁹⁴

148. There was an echo of these remarks in a slightly different context, when Iain McKie of Justice for Megrahi (referring to the on-going debate about the legality of releasing information without the subjects’ consent), said that “political will”⁹⁵ was

⁹² Policy Memorandum, paragraphs 63 to 65.

⁹³ As potentially required under the Bill (see discussion below)

⁹⁴ Sir Gerald Gordon. Written submission. Also Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 924.

⁹⁵ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 903.

needed to secure publication of information, rather than seeking to rely on public servants to do so.

149. The Committee accepts that it has been for politicians to show leadership in determining whether the Megrahi statement to be published. It could be argued that that leadership was partly manifested in Part 2 of the Bill being brought forward and would be further manifested if the Parliament ultimately agrees to its provisions, having satisfied itself that they are likely to do what the Scottish Government intends of them.

150. Recent events may now mean that the SCCRC is likely to have little or no role in relation to preparing the Megrahi statement of reasons for publication, even if the Bill is agreed to. However, the Committee wishes to make clear that, in our view, the SCCRC would have been the appropriate body to carry out the important administrative work required under the Bill, and indeed under other relevant legal rules (eg data protection) before any information in the Megrahi statement could have been released. The SCCRC is an independent statutory body, it was untainted by any connection with the original trial, and it is more likely than any other body to have had prior contact with the persons that would need to be contacted before any decision could have been made on releasing any information.

151. The question whether the SCCRC would have been the appropriate body to make the final decision whether to release information in the Megrahi case, once any necessary administrative steps had been taken, likewise appear to have been rendered irrelevant by recent events. The Committee notes that the current leadership of the SCCRC appeared to be comfortable in this role, having repeatedly made clear their willingness to disclose the statement if given the appropriate legal tools. Their Chief Executive, Gerard Sinclair, told the Committee that determining whether to release information would involve considering—

“whether the disclosure of information might give the public a fuller understanding of the level of investigation that the commission had carried out and the reasoning behind the commission’s decision to refer a case. On the national and international interest in the Megrahi case, the commission is on the record as saying that it feels that disclosure would benefit the public’s understanding of the commission’s role in publication of the statement of reasons document.”⁹⁶

152. Mr Sinclair was also invited to set out when the SCCRC might be minded not to disclose information. He answered that if—

“we had to redact the document and delete parts of it,⁹⁷ and if that got to the stage where we felt that the document was becoming unbalanced and did not reflect the commission’s views, we may well decide that it would not be

⁹⁶ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Cols 876-877.

⁹⁷ As potentially required under the Bill: see discussion below.

appropriate to publish that edited document and we would give reasons for that.”⁹⁸

153. The above indicates that the SCCRC applied a “public interest” test in determining whether it would be willing to publish the Megrabi statement, and that in making any final decision to publish, it would also have taken into account whether the information it was able to disclose presented a balanced picture. These appear to be entirely reasonable matters for the SCCRC to be taking into account, although they are not expressly referred to in the test set out in the Bill.

154. Although Part 2 has been presented mainly as a response to the Megrabi case, there has been no indication given that the Scottish Government intends to repeal it if and when the Megrabi statement, or a redacted version of it, is disclosed. The Cabinet Secretary specifically told the Committee that the Bill had intentionally been drafted so as to be general rather than specific, in order to deal with a “lacuna” in the law, and that there may well be other cases in future where the Bill could be of assistance.⁹⁹

155. The Committee accepts that there may be a lacuna in the law that requires to be filled. It could be argued that the Megrabi appeal is a special case and that ordinarily if an appeal falls there is no particular reason why a statement of reasons should be published, following a lengthy administrative process. On the other hand, if it is appropriate in principle to disclose information about the basis of the Megrabi appeal, because that information was never recited in open court, on account of the huge public interest in the case, then there is no reason to suppose that such circumstances could not recur in another case in future. If so, it could be argued that the main factors the SCCRC should take account of in determining whether to disclose information should be expressly alluded to. In relation to the Megrabi case, the SCCRC has been clear from the outset that they would be minded to publish, given the opportunity. It is not clear whether this would pertain in future cases.

156. Following recent events, the Committee notes that the question whether the SCCRC is the appropriate body to undertake (a) the administrative process of preparing the Megrabi statement of reasons for publication and (b) the final decision whether to publish the statement (or a redacted version of it) may have been superseded by events.

157. However, the Committee is clear that the SCCRC would generally be the appropriate body to undertake the administrative process envisaged under Part 2 of the Bill.

158. In relation to the final decision-making process, the Committee notes the SCCRC’s evidence that it would have been willing to take the decision to publish the Megrabi statement given the appropriate legal tools. The Committee invites the Scottish Government to consider whether it would be of benefit, for future cases, if the factors the SCCRC should take into account in determining whether to disclose information should be expressly

⁹⁸ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 879.

⁹⁹ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 955.

set out (whether in the Bill or, for instance, in guidance from the Scottish Ministers.) If so, it appears to the Committee that the public interest should be a key consideration.

Further steps required under the Bill

159. The Bill goes on to require some additional steps before information can be disclosed. Some are to be taken before any decision to disclose information is made. Others are to be taken once that decision has been made.

160. New section 194N requires the SCCRC, so far as practicable, to notify and seek the views of any affected person before deciding whether to disclose any information. An “affected person” is a person to whom the information directly relates from whom it was obtained (directly or indirectly). It must also, as far as practicable, consult any “interested person” ie the Lord Advocate and any other person appearing to have a “substantial interest” in the question whether the information should be disclosed. Interested and affected persons must be allowed a minimum of six weeks to respond and to take steps in their favour, which may include legal steps. The Committee takes this reference to “legal steps” to be to measures that might prevent information from being disclosed, as discussed further below.

161. New section 194O makes provision for information that originated from a foreign authority under international assistance arrangements. The SCCRC may not disclose such information without the consent of the foreign authority, whether that was signified in advance or by subsequent direct communication between the authority and the SCCRC. This is the only part of Part 2 expressly providing that a lack of consent blocks disclosure. (The SCCRC described it as a veto power.¹⁰⁰) The policy memo explains that this is included—

“to ensure international obligations are not breached. In addition, disclosing information obtained from foreign authorities without their consent could risk undermining the operation of existing mutual legal assistance agreements, adversely affecting efforts to tackle crime, including serious organised crime, in the future.”¹⁰¹

162. A fairly complex explanation of the terms “international assistance arrangements” and “foreign authority” is provided in section 194P. The Committee notes that “foreign authority” is a wider category of person or body than “foreign government” would be.

163. The Committee briefly explored with the SCCRC whether the fact that information emanating from a foreign authority that the SCCRC held was obtained via a third party (such as the UK Government) would nullify the foreign authority’s effective veto power over disclosure of that information. The SCCRC’s Michael Walker explained that in their view it would not and that “ultimately, the issue is where the information has come from, not the route by which it has come.”¹⁰²

¹⁰⁰ Scottish Criminal Cases Review Commission. Written evidence.

¹⁰¹ Policy Memorandum, paragraph 56.

¹⁰² Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 881.

164. New section 194R makes provision in relation to circumstances where the SCCRC have decided to disclose information. There are two requirements. First, before disclosing any information, the SCCRC must take reasonable steps to notify this to any affected and interested persons, giving them six weeks to take steps in their own favour (which may include legal action). Secondly, in disclosing information, the SCCRC must “explain the context in which the information is being disclosed” and explicitly state whether other information is being withheld. The Policy Memorandum states that this is to “aid general understanding of the wider context of the case” and “help ensure that information being disclosed is properly interpreted.”¹⁰³ As noted earlier, the SCCRC appear to consider that if they are required to make redactions that risk making the report unbalanced, they may take this to be grounds not to disclose it.¹⁰⁴

165. The Committee notes overall that these provisions relating to the administrative steps to be taken by the SCCRC did not occupy much of our Stage 1 consideration. This may be because witnesses considered issues relating to data protection to be much more material to the ultimate determination as to whether information could be disclosed.

166. Justice for Megrahi described the mechanism provided to allow objections to disclosure “cumbersome”.¹⁰⁵ However, the Information Commissioner’s Office expressed a favourable view overall of the process, remarking of sections 194N and 194R that, taken together they “enhance the fairness of the processing being undertaken and are consistent with the requirements of the DPA [Data Protection Act 1998].”¹⁰⁶ These comments are significant because they underline the Information Commissioner’s case that the framework set out in the Bill may help ensure that what the Cabinet Secretary referred to as “data protection obstacles” can be successfully negotiated (see discussion below).

167. The Association of Chief Police Officers Scotland also expressed a generally positive view.¹⁰⁷ However it expressed concerns about the SCCRC having “an unfettered legal right” under section 194M to release information, notwithstanding the objections of interested parties. This is technically true within the narrow confines of the Bill (except in relation to “foreign authority” evidence where an objection would block disclosure). But it does not take account of the likely impact of other laws, such as data protection, as discussed below. ACPOS called for (a) an appeals mechanism against a decision to disclose or (b) the right to refer such a decision to the Information Commissioner. Given the right to make representations already built into the Bill, combined with the potential availability of other legal remedies (for instance under the Data Protection Act), the Committee is not persuaded that these additional provisions are necessary.

168. In relation to the requirement to obtain consent from foreign authorities (under section 194P), the SCCRC, whilst not objecting to it, noted that it might have some difficulty in identifying the relevant authority and that it would in

¹⁰³ Policy Memorandum, paragraph 57.

¹⁰⁴ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 879.

¹⁰⁵ Justice for Megrahi. Written submission

¹⁰⁶ Information Commissioner’s Office. Written submission.

¹⁰⁷ ACPOS. Written submission

practice require the Lord Advocate's assistance. It considered that the key terms used in section 194P had been defined widely and would, for instance, catch information obtained from Libyan witnesses, apparently therefore requiring the consent of the current transitional Government there.¹⁰⁸

169. The Committee broadly welcomes the provisions in Part 2 relating to the notification of interested and affected parties, and notes, in particular, the Information Commissioner's view that they may help ensure that information is disclosed in compliance with data protection requirements.

170. In relation to information emanating from foreign authorities under international agreements, the Committee notes that the Bill in effect gives the authority a veto power over the disclosure of such information. This might be considered contrary to the principles underlying Part 2, but the Committee accepts that the inclusion of such a provision may be practically unavoidable.

171. The Committee notes that the Bill makes it possible for the SCCRC to publish an incomplete statement of reasons, but requires the SCCRC to make this expressly clear, as well as to explain the context in which information is being disclosed. This appears to be a measured approach. On the other hand, questions would be raised about the disclosure of a statement that has been substantially redacted, given the aim of openness and transparency that lies behind Part 2 of the Bill. We also note the SCCRC's comments that they would be unlikely to publish the Megrahi statement if, following redaction, it had become "unbalanced" and recommend that similar reasoning should be applied in any future cases.

Data protection and other potential obstacles to disclosure outwith the Bill

172. The policy memorandum accompanying the Bill says that in deciding whether to disclose information, the SCCRC—

“will be required to ensure that the disclosure of the information did not contravene any relevant statute applying in the situation. Statutory requirements contained in legislation such as the Data Protection Act 1998 and the Official Secrets Acts are not affected by the provisions in this Bill and these statutory requirements are likely to be relevant in considering the disclosure of information.”

Data protection - introduction

173. Data protection was the main issue discussed in relation to Part 2. The Scottish Government and the SCCRC were amongst those of the initial view that it would be a significant, possibly insurmountable, obstruction to effective disclosure of the Megrahi statement. The Information Commissioner took a more nuanced view. The latter's views are particularly significant, given the Information Commissioner's regulatory role under the Data Protection Act. Lately, though, there appears to have been something of a convergence of views between these

¹⁰⁸ Scottish Criminal Cases Review Commission. Written submission

three parties. Justice for Megrahi considered the whole issue of data protection to be “a complete red herring”.¹⁰⁹ All of this is discussed further below.

174. Data protection is a complex legal issue. The Committee saw it as its role in scrutinising Part 2 to understand the key provisions as they apply to the Bill and to seek and, where necessary, tease out, key stakeholders’ views, so as to reach an informed conclusion as to how effective Part 2 was ultimately likely to be. At the time that the Committee was taking this evidence, the statement of reasons in relation to the Megrahi case had not of course been disclosed. To that extent, the following discussion might be considered to be partly superseded by events. However, the Committee considers it important to set out the main points that were made and the conclusions we ultimately reached. It may be that the discussion is relevant to future cases.

175. Key provisions¹¹⁰ of data protection law as they apply to the Bill (terms in quotation marks derive from the Data Protection Act) are that—

- the SCCRC is the “data processor”: it must process data in accordance with the “data protection principles”;
- these include the principles that “personal data” must only be obtained for “specified and lawful purposes”, and that personal data must be processed “fairly and lawfully” and cannot be processed unless at least one of the conditions set out in schedule 2 of the Data Protection Act must be met;
- in relation to “sensitive personal data”, at least one additional condition, as set out in schedule 3, must also be met;
- publishing the statement under the Bill would amount in practice to processing data;
- the SCCRC consider that much of the information in the statement of reasons is personal data or sensitive personal data.¹¹¹

176. It may be helpful to add that the fact that particular information may, if an appeal had proceeded, have ended up being disclosed in open court is apparently not in itself a ground for determining that disclosure of data is permissible.¹¹² Another issue clarified during evidence-taking is that consents in relation to data protection apply only to personal data pertaining to living persons.¹¹³

¹⁰⁹ Justice for Megrahi. Written submission

¹¹⁰ As discussed further in the written submissions of the SCCRC and the Information Commissioner’s Office and in correspondence from Lord McNally and the Cabinet Secretary (letter of 23 January 2012).

¹¹¹ Scottish Criminal Cases Review Commission. Written submission.

¹¹² Scottish Parliament Justice Committee. *Official Report, 31 January 2012*, Cols 885-886.

¹¹³ Scottish Parliament Justice Committee. *Official Report, 31 January 2012*, Col 890. Dr Ken Macdonald of the Information Commissioner’s Office qualified this by pointing out that that this did not simply mean that all data relating to the deceased person could then be published; if that information related to living third parties then they would potentially have continuing rights relating to data protection. If the deceased had provided information on condition that it remained

Consent of data subjects

177. As noted, in 2009 the SCCRC was not able to obtain consent from interested parties in the Megrahi case and in Stage 1 evidence they indicated that they thought it unlikely they would obtain the relevant consents if required to do so again.¹¹⁴ This may be considered puzzling, since those who provided information to the SCCRC as part of its investigation presumably did so voluntarily and in the awareness that the information may have ended up being recited in open court.¹¹⁵ However, the Committee is in no position to speculate as to the motivations of individuals, known and unknown, and must accept at face value the SCCRC's view that consent is unlikely.¹¹⁶ Sensitive personal data volunteered by one individual that pertains to another is perhaps in a special category; again the Committee is not in any position to speculate as to how much of the information in the statement falls into that category.

Scottish Government view

178. In a letter to the Convener sent near the beginning of Stage 1,¹¹⁷ the Cabinet Secretary said that he saw "the only realistic means of meeting the requirements of data protection legislation to allow disclosure of information which consists of personal data or sensitive personal data" to be the SCCRC obtaining the consent of interested parties. He added that "without steps being taken to remove data protection obstacles ... our understanding is that it will be very difficult for the Commission to be able to disclose information in the Megrahi case, even if the Commission decided it was appropriate to do so under the terms of the Bill".

179. The Cabinet Secretary had earlier written to the UK Justice Secretary, requesting the removal of "data protection obstacles" in relation to the Megrahi statement of reasons, to help give effect to Part 2 of the Bill.¹¹⁸ It has since been made clear that the Cabinet Secretary was asking the Justice Secretary to consider making an order under schedule 3, paragraph 10 of the Data Protection Act. This enables the UK Secretary of State to specify circumstances where the processing of sensitive personal data is permissible. The Committee notes that the Cabinet Secretary repeated this request to the Secretary of State during Stage 1, most recently in relation to the disclosure of information about the statement in the

confidential then that too might mean that there would be continuing legal barriers. (Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Cols 933-934)

¹¹⁴ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Cols 879-880.

¹¹⁵ This would not be the case if information were volunteered on the understanding that it would never be recited in open court. However, the SCCRC explained to the Committee that there is only one piece of information referred in the statement of reasons that they considered they were unable to disclose the detail of. They also explained that there is no information in the statement to which the Official Secrets Acts might apply. (Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Cols 885-886.)

¹¹⁶ There were some exchanges with Justice for Megrahi as to Megrahi's position with regard to disclosure (Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Cols 908-911) We note that the newspaper's decision to publish the statement of reasons on 25 March was apparently taken with Megrahi's consent

¹¹⁷ http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120123_CSfJ_to_CG.pdf

[Accessed 28 March 2012]

¹¹⁸ <http://www.scotland.gov.uk/Resource/Doc/254430/0123653.pdf> [Accessed 28 March 2012]

media.¹¹⁹ He said that this made it “imperative” for the SCCRC to be given the power to place a “balanced account” of its statement in the public domain.

180. In relation to the view from the Information Commissioner’s Office that conditions in the Data Protection Act itself might help afford a way round some of the data protection obstacles (discussed below), the Cabinet Secretary told the Committee that this did not reflect his understanding and that he expected this view to change once the Deputy Information Commissioner for Scotland had met the SCCRC.¹²⁰

Initial UK Government position

181. In his reply to the Cabinet Secretary’s first letter, the UK Secretary of State said that the Data Protection Act is based on a European directive, that “any consideration of data protection compliance must also include consideration of the intentions of the directive,” and that it is not possible to create a “general exception” to data protection legislation. He indicated however that he would be happy to allow officials in his department to discuss with the SCCRC the sort of personal data that would be likely to be disclosed in relation to the Megrahi case, in order to enable him to come to a more detailed view.

SCCRC view

182. The SCCRC indicated¹²¹ that they saw data protection as a potentially formidable obstacle, particularly in relation to sensitive personal data in the statement. Their “starting position”¹²² was that an order from the UK Secretary of State would be necessary. In response to the question as to whether this risked creating a dangerous precedent as regards the handling of personal data and sensitive personal data, Gerard Sinclair of the SCCRC told the Committee that he did not see that making such an order would “breach the dam”. The making of such orders was precedented, and they tended to be made for very limited purposes.¹²³

183. The SCCRC indicated that they would be happy to meet with both the UK Ministry of Justice and the Information Commissioner’s Office to tease out whether any of the other schedule 3 conditions might permit them to lawfully disclose such data. The two conditions that they had particularly in mind were—

- paragraph 7(1)(a) of schedule 3; that the processing is necessary for the administration of justice, and
- paragraph 7(1)(b); that the processing is necessary for the exercise of any functions conferred on a person by or under an enactment.

184. However, their view was that it was unlikely that either would be of assistance in the Megrahi case unless a “very broad interpretation”¹²⁴ was applied.

¹¹⁹ <http://www.scotland.gov.uk/Resource/0038/00388967.pdf> [Accessed 28 March 2012]

¹²⁰ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Col 953.

¹²¹ Scottish Criminal Cases Review Commission. Written submission.

¹²² Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 879.

¹²³ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 879.

¹²⁴ Scottish Criminal Cases Review Commission. Written submission.

Information Commissioner's view

185. As already noted, the written evidence of the Information Commissioner's Office took a favourable view of the process set out in the Bill, considering that it helped meet the key data protection principles that data must be processed fairly, and for one or more specified and lawful purposes. The evidence concluded that—

“The amendments to the Criminal Procedure (Scotland) Act 1995 contained within the Bill will help ensure that the disclosure of Statement of Reasons by the SCCRC in cases where appeals have been abandoned or otherwise withdrawn, meet with the provisions of the DPA. Importantly, the Bill contains a robust legislative framework which will ensure that such disclosure is fair and lawful.”

186. In evidence to the Committee, Dr Ken Macdonald, the Deputy Information Commissioner responsible for Scotland, clarified that the import of this evidence was that the Bill appeared to satisfy the schedule 3 condition that permits the processing of information for the purpose of administration of justice (paragraph 7(1)(a) of the schedule). This meant that the SCCRC would be able to publish the information lawfully without the consent of the data subject.¹²⁵

187. It is important to stress that the Committee did not understand this evidence as meaning that the Bill guarantees compliance with data protection law. Rather, it was the Information Commissioner's view that the Bill affords a strong opportunity for the SCCRC to comply with the law, by setting out a robust framework within which the SCCRC must operate. Ultimately, if individuals thought the processing was unlawful they could still go to court for a determination.¹²⁶ Dr Macdonald also expressly noted that it would still be necessary to ensure adherence to human rights law and other possible obligations such as those relating to breach of confidence, even if data protection principles were not breached.¹²⁷

188. Dr Macdonald accepted that the SCCRC took a different view, adding that—

“The potential solution is to review the proposed amendments in the bill and include a more explicit statement that the SCCRC has the power to produce reports and release information on appeals that are not proceeding.”¹²⁸

189. In this connection, the Committee notes that the language of the 7(1)(a) condition (and indeed of the 7(1)(b) condition) is of necessity. The test that the SCCRC must apply under the Bill in determining whether to publish a statement of reasons is that it has “determined that this is appropriate in the whole circumstances for the information to be disclosed”.¹²⁹ As we discussed earlier, this appears to be in the nature more of a discretionary power, rather than of a legal duty to disclose (where certain conditions are met), although the issue is perhaps not entirely clear cut.

¹²⁵ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 928.

¹²⁶ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 931.

¹²⁷ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 930.

¹²⁸ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 928.

¹²⁹ New section 194M(1)(b) of the Criminal Procedure (Scotland) Act 1995, as inserted by section 3(3) of the Bill.

190. This led the Committee to invite Dr Macdonald to speculate as to whether, for instance, substituting “necessary” for “appropriate” in the test might help strengthen the SCCRC’s ability to rely on either of the schedule 3 conditions. He agreed that it might.¹³⁰

191. On the other hand, the Committee notes the fundamental principle of proportionality that underpins all European law, including the directive on which the Data Protection Act is based. To that extent, the Act’s provisions should not be construed as requiring a more restrictive processing of data than is necessary to meet the Treaty objectives.¹³¹ This may permit a less strict interpretation of necessary that would be the case in non-EU originating legislation, such that a “necessary” action in terms of the two conditions might be an action that is proportionate in the circumstances. If this were the case, there may mitigate any perceived need for an amendment of the test along the lines proposed.

192. For their part, the SCCRC who were invited to respond to Dr Macdonald’s comments about “strengthening” the test, expressed concern¹³² that an amendment requiring rather than empowering them to disclose information (provided certain other conditions are met) might risk taking the Bill outwith the Parliament’s vires, by appearing to override data protection or human rights law.

Justice for Megrahi’s view

193. Justice for Megrahi considered that the Scottish Government had taken a fundamentally wrong legislative route in introducing primary legislation to enable disclosure of the statement. This view turns on the proper interpretation of subsection (4) of section 194K of the Criminal Procedure (Scotland) Act 1995.

194. Subsection (1)(f) of that section sets out the power to make an order permitting the disclosure of information held by the SCCRC (for instance in a statement of reasons) that it would otherwise be unlawful to disclose. This is the power that was used to make the 2009 Order.

195. Subsection (4) of section 194K goes on to provide that—

“Where the disclosure of information is excepted from section 194J of this Act by subsection (1) or (2) above, the disclosure of the information is not prevented by any obligation of secrecy or other limitation on disclosure (including any such obligation or imposed by, under or by virtue of any enactment) arising otherwise than under that section.”

196. In their written evidence, Justice for Megrahi noted that the Bill—

“does not (and cannot because of the restrictions on the Scottish Parliament’s legislative competence) replicate the provision of section 194K(4) of the 1995 Act. ... This means that under the Bill common law and statutory obligations of secrecy or confidentiality could be founded upon by the suppliers of the information, or any persons directly affected by it, in any legal action taken by them to block disclosure. But if a *statutory instrument*

¹³⁰ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Cols 929-930.

¹³¹ Article 5, Treaty of Rome.

¹³² Scottish Criminal Cases Review Commission. Supplementary written submission.

were used by the Scottish Ministers to remove the restriction on disclosure -- the mechanism which is specifically mandated in section 194K(1)(f) – these common law and statutory obligations of secrecy or confidentiality would be overridden.”¹³³

197. Justice for Megrahi’s solution was simple: instead of proceeding with Part 2 of the Bill, the 2009 Order should be revised, with the requirement to seek the consent of interested parties, which had ultimately frustrated the SCCRC’s attempts to secure disclosure under that route, struck out. Section 194K(4) could then be relied upon to override data protection or other obstacles.¹³⁴

198. Other witnesses to express a view did not agree with Justice for Megrahi. The SCCRC itself did not consider that an order under section 194K(1)(f) would allow it to avoid data protection considerations. It drew attention to section 57(2) of the Scotland Act, which provides that the Scottish Government may not make legislation (including subordinate legislation), or do any other act, so far as it is incompatible with Community law. The SCCRC noted that the Data Protection Act implemented a European directive.

199. James Chalmers of the University of Edinburgh Law School observed that the Data Protection Act 1998 Act post-dated the legislation creating the SCCRC. It was not clear, he argued, how section 194K “could be taken as pre-emptively carving out an exception to it”.¹³⁵

200. A supplementary written submission from Justice for Megrahi challenged Mr Chalmers’ view as “fallacious”—

“Section 194K(4) was amended by the Scotland Act 1998 to substitute “the Scottish Ministers” for “the Secretary of State”.¹³⁶ The Scotland Act 1998 received the Royal Assent on 19 November 1998, more than four months AFTER the Data Protection Act 1998 (16 July 1998). Accordingly, the power conferred on the Scottish Ministers by section 194K(4) to override legislative obligations of secrecy postdates the Data Protection Act. The United Kingdom Parliament had the opportunity in the Scotland Act specifically to exclude data protection from the Scottish Ministers’ power to override legislative obligations of secrecy, but it did not avail itself of that opportunity.”¹³⁷

201. The Committee, however, notes that section 53(1) of the Scotland Act enables order-making powers to be devolved to the Scottish Ministers only to the extent that “they are exercisable within devolved competence”. It does not appear to be disputed by Justice for Megrahi that data protection law is outwith devolved competence; this is clearly set out in the Scotland Act.¹³⁸ Section 54(2) of the Act

¹³³ Justice for Megrahi. Written submission.

¹³⁴ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 898-902.

¹³⁵ James Chalmers. Supplementary written submission.

¹³⁶ I.e. to devolve the order-making power from the UK Secretary of State to the Scottish Ministers (in practice the Cabinet Secretary for Justice).

¹³⁷ Justice for Megrahi. Supplementary written submission.

¹³⁸ Schedule 5, Part 1, Paragraph B2 of the Scotland Act 1998. Available at: <http://www.legislation.gov.uk/ukpga/1998/46/contents> [Accessed 26 March 2012].

also provides that it is outside devolved competence “to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament.” This was noted by the Cabinet Secretary, who also expressed clear disagreement with Justice for Megrahi’s interpretation of the law.¹³⁹

Recent developments

202. The discussions between officials of the SCCRC, the Information Commissioner’s Office and the UK Ministry of Justice alluded to above took place following the Committee’s evidence-taking but were concluded before the publication of a redacted version of the statement of reasons by a newspaper on 25 March. The latter event has of course significantly changed the circumstances but the Committee considers it useful to retain the following summary as an indication of how legal discussions on data protection were eventually resolved.

203. Following earlier indications from the Cabinet Secretary that he was minded to leave it to the SCCRC and UK Government officials to discuss data protection issues,¹⁴⁰ the Committee is pleased to note that officials from the Scottish Government Justice Department also joined those discussions.

204. All four parties helpfully provided updates to the Committee on the progress of those discussions, so as to help inform the content of this report. In summary, it would appear that the main outcome of the discussions is that SCCRC officials had become more receptive to the argument put forward by both the Information Commissioner and representatives from the UK Ministry of Justice that disclosure of sensitive personal data by the SCCRC could satisfy condition 7(1)(a) of Schedule 3; that the processing is necessary for the administration of justice (condition 7(1)(a)).

205. Prior to the newspaper’s publication of the statement of reasons on 25 March, the Committee had understood the situation to be that the SCCRC were not yet in a position to formally confirm that they broadly agree with the Information Commissioner’s view, since this would require ratification by the Members of the SCCRC. An SCCRC Board meeting was to take place on 30 March. If the Board were to accept the argument put forward by the Commissioner and the Ministry of Justice, there would appear to be no need for an order from the UK Secretary of State under paragraph 10 of schedule 3. The Committee is not clear whether events have moved on to such an extent that the SCCRC now considers this issue academic.

206. In the light of these discussions, the UK Secretary of State confirmed to the Committee that he was not minded to make an order under paragraph 10.¹⁴¹

207. In a letter¹⁴² to the Convener following the discussions, the Cabinet Secretary confirmed the above, and added that if the SCCRC were to accept that condition

¹³⁹ Scottish Parliament Justice Committee. Official Report, 21 February 2012, Col 952.

¹⁴⁰ Scottish Parliament Justice Committee. *Official Report*, 21 February 2012, Cols 953-954.

¹⁴¹

http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120320_Ken_Clarke_to_CG.pdf [Accessed 28 March 2012]

7(1)(a) were applicable this would appear to pave the way to the statement being capable of lawful disclosure under the Bill “without amendments to the Bill being made by the Scottish Government”. The Committee takes this to mean that the Scottish Government did not see any legal advantage to be gained from converting the power of the SCCRC to publish the statement under the Bill into a duty, or in some other way “strengthening” the power.

208. This appears to be a satisfactory outcome, and the constructive way in which discussions proceeded is to be welcomed. That said, it is perhaps regrettable in hindsight that the Information Commissioner’s Office was not consulted before Part 2 was introduced. (In this connection, the Committee notes that the Scottish Government had only one consultee on Part 2 prior to introduction – the SCCRC – which is unusual for a public Bill.) If so, some of the uncertainty that existed over data protection during Stage 1 might have been avoided.

Conclusions on data protection

209. The Committee notes the recent publication of a redacted version of the Megrahi statement of reasons by a Scottish newspaper, but considers it useful to set out our conclusions on the applicability of data protection law to the SCCRC.

210. The Committee is not persuaded by the argument that any data protection obstacles could have been avoided through the Cabinet Secretary for Justice exercising an order-making power rather than introducing a Bill. The legal position is clear: the Parliament does not have the power to override data protection law whether by primary or secondary legislation.

211. The Committee notes the emergence of an apparent consensus among key stakeholders that one of the conditions permitting the lawful disclosure of personal data and sensitive personal data (that the processing is necessary for the administration of justice) may be applicable. This would permit the publication of information in the statement of reasons whether or not consent was obtained. If this is ultimately accepted, then an order enabling disclosure from the UK Secretary of State for Justice would not be necessary.

212. The Committee invites the Scottish Government to clarify whether it considers there would be any legal benefit or disbenefit, in terms of data protection law, in altering the current test to be applied by the SCCRC in determining whether to publish a statement of reasons (for instance by providing that this is, under certain circumstances, a duty rather a power).

Other potential obstacles to disclosure

213. The Policy Memorandum briefly mentioned two other possible obstacles to disclosure not set out in the Bill; the Official Secrets Acts and the case law of the ECHR. A letter from the Convener invited the Cabinet Secretary to elaborate and to state whether there might be other obstacles. The Cabinet Secretary’s reply

¹⁴² http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120316_CSfJ_to_CG.pdf
[Accessed 28 March 2012]

appears to indicate that these two matters represent, in the Scottish Government's view, an exhaustive list of those other obstacles.¹⁴³

214. The only other issues raised in evidence (other than legal professional privilege; see below) were third party confidentiality and the common law of breach of confidence. These were raised by Dr Macdonald of the Information Commissioner's Office.¹⁴⁴

215. In relation to the Official Secrets Acts, the Cabinet Secretary's letter said that, without knowing the content of the statement of reasons, it would be difficult to know whether the Acts would be relevant but that it was likely that they would "at the very least need to be considered depending on the nature of the information in the SoR [ie the statement of reasons in the Megrahi case]."

216. However, in their written evidence, the SCCRC said that they did not consider that anything in the statement of reasons in the Megrahi case would be covered by the Official Secrets Act. They were questioned further on this in the evidence before the Committee. Gerard Sinclair of the SCCRC agreed that, in any case that did involve official secrets, the statement of reasons would not mention them unless they could obtain consent to do so. He elaborated—

"If we were given material that was covered by the Official Secrets Acts, we would not disclose it. We might go back to the providers of the information to ask for it to be made exempt or for a dispensation. If we were told that we could have the information to assist us in reaching a decision but that it was not to be placed in the public domain or appear in the body of the statement of reasons, we could choose not to accept the information under those terms or to accept it and abide by them."¹⁴⁵

217. The potential relevance of human rights law was referred to relatively inconclusively during Stage 1. The Committee considers that this is perhaps understandable since, without knowing the content of the statement, it would be difficult to conjecture what human rights issues might arise, although it is reasonably evident that the most relevant Article is likely to be Article 8 (the right to respect for private and family life, home and correspondence). The SCCRC considered that there was an inextricable link between data protection and human rights considerations in that there was a correlation between the non-disclosure of sensitive personal data and the right to private and family life.¹⁴⁶ It is clear to the Committee that if it turns out to be possible for the SCCRC to release information within the terms of the Data Protection Act, but without the consent of data subjects, then Article 8 considerations will have to be taken into account.

¹⁴³ http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20120123_CSfJ_to_CG.pdf [Accessed 28 March 2012]

¹⁴⁴ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Col 932-934. The Cabinet Secretary's reply also mentioned these potential remedies, as well as privacy rights, but indicated that such actions tended to be brought only in actions between private parties rather than against a public body (such as the SCCRC), where it was not possible to rely on human rights law.

¹⁴⁵ Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 886

¹⁴⁶ Scottish Criminal Cases Review Commission. Written submission.

218. Ken Macdonald of the Information Commissioner's Office indicated that human rights aspects would have to be taken account of at two stages; first in the Parliament satisfying itself that the Bill, as enacted, would not breach Article 8 of the convention, and second when it came to the SCCRC actually deciding to disclose information under the Bill as enacted.¹⁴⁷ In other words, the fact that the Bill as enacted, might not flout the ECHR would not mean that every action undertaken by the SCCRC by virtue of the powers conferred under the new Act would be ECHR compliant.

219. The Committee notes that if the SCCRC acted in compliance with the data protection principles in releasing information, this does not necessarily mean that human rights considerations would not arise. This would need to be taken account of particularly in circumstances where the SCCRC disclosed sensitive personal data without express consent. However, the Committee has no reason to believe that this is an insurmountable legal difficulty.

Legal professional privilege

220. Another potential inhibition on disclosure referred to in evidence is legal professional privilege. This was raised by the SCCRC who indicated that they intended to pursue the matter with the Scottish Government during the Bill's progression. Privilege comes into a different category from data protection and human rights law in that it is not a reserved matter under the Scotland Act. There would therefore appear to be potential for it to be taken account of within the Bill, although as discussed below, human rights consideration may still arise.

221. The SCCRC noted¹⁴⁸ the absence of any express reference to legal professional privilege to any determination whether to disclose information. The SCCRC was clear that some of the information it held would be covered by legal professional privilege. They recited the legal position that privilege could only be overridden by express words or necessary implication in statute and noted that it was uncertain whether this was currently provided for in the 1995 Act. The SCCRC said that if it were intended that they should be allowed to override privilege, it may help to make this expressly clear.

222. On the other hand, the SCCRC noted, the case law of the European Court of Human Rights would have to be taken into account, as it had previously ruled that overriding legal professional privilege could, depending on circumstances, be a breach of human rights.¹⁴⁹ The Committee notes the legal position that a Bill passed by the Scottish Parliament is not law inasmuch as any part of it is not compliant with the European Convention on Human Rights.

223. The Committee invites the Scottish Government to consider the points raised by the SCCRC on legal professional privilege and on whether it would be possible to competently address this within the Bill.

¹⁴⁷ Scottish Parliament Justice Committee. *Official Report*, 7 February 2012, Cols 932-933.

¹⁴⁸ Scottish Criminal Cases Review Commission. Written submission.

¹⁴⁹ Scottish Criminal Cases Review Commission. Written submission. Scottish Parliament Justice Committee. *Official Report*, 31 January 2012, Col 887.

OTHER ISSUES: DELEGATED POWERS AND FINANCIAL MEMORANDUM

Delegated powers

224. Section 2 confers power to make supplemental, incidental, consequential, transitional, transitory or saving provisions to either Part 1 of the 1993 Act or Part 2 of the 2007 Act, both of which concern court sentencing. This can be done if the Scottish Ministers consider that it is “necessary or expedient for the purposes of or in connection with section 1.”¹⁵⁰ Regulations under section 2 are by affirmative procedure. The Bill’s Delegated Powers Memorandum explains—

“Any body of new law may give rise to the need for a range of ancillary provisions. For example, whilst we have included a number of substantive and consequential modifications within the Bill, it may be that the need arises post-commencement for further changes in order to fully and properly implement section 1. We consider the regulation-making power to be necessary to allow for this flexibility in what is in our view an important and complicated area of law.”

225. In its evidence to the Justice Committee, the Faculty of Advocates questioned whether the proposed powers in Section 2 are “appropriate, given the sensitivity and importance of sentencing policy.”¹⁵¹ The Committee takes this to be indicative of a concern that substantive primary legislation on sentencing should not be alterable by secondary legislation.

226. The Subordinate Legislation Committee (SLC) considered section 2. While it agreed that “the affirmative procedure is an appropriate level of scrutiny”,¹⁵² it asked the Scottish Government whether the powers in section 2 were in fact limited to Part 1 of the 1993 Act or Part 2 of the 2007 Act, or whether they “might modify any primary legislation”.¹⁵³ In its response, the Scottish Government said that they consider that regulations made under section 2 can only modify Part 1 of the 1993 Act or Part 2 of the 2007 Act. The Scottish Government also points out that section 2(1) restricts the power to only be used in connection to section 1.

227. However, in its report, the SLC added that the Scottish Government appeared to have conceded that—

“it is at least arguable that an interpretation other than their favoured one is possible, and that it may theoretically be possible to modify other enactments, subject always to the test set out in subsection (1).”¹⁵⁴

228. The SLC subsequently concluded in their report that it was—

¹⁵⁰ Criminal Cases (Punishment and Review) (Scotland) Bill, section 2(1)

¹⁵¹ Faculty of Advocates. Written submission.

¹⁵² Scottish Parliament Subordinate Legislation Committee. 7th Report, 2012 (Session 4). *Criminal Cases (Punishment and Review) (Scotland) Bill* (SP Paper 72). Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/46728.aspx>

¹⁵³ Scottish Parliament Subordinate Legislation Committee. 7th Report, 2012 (Session 4).

¹⁵⁴ Scottish Parliament Subordinate Legislation Committee. 7th Report, 2012 (Session 4).

“undesirable for there to be two competing potential views on the scope of this power, and if this is considered by the Scottish Government to be a real possibility then it may be something which it wishes to review. Nevertheless, the Committee recognises that the scope of the power is appropriately limited by subsection (1).”¹⁵⁵

229. The Committee notes that there are two competing views on the scope of section 2(2), which concerns the power to amend primary legislation on sentencing by subordinate legislation. The Committee recommends that the Scottish Government give further consideration to the drafting of this provision prior to Stage 2.

Financial Memorandum

230. The Financial Memorandum¹⁵⁶ outlines the anticipated costs for the Bill. While the Scottish Government considers that the provisions in Part 1 will have “a neutral long-term financial impact”, it anticipates that the Scottish Criminal Cases Review Commission will accumulate costs of approximately £116,000 in connection with Part 2. This figure is based on the SCCRC’s consideration of whether it is appropriate to disclose information it referred to the High Court in relation to the Megrabi case.

231. The Finance Committee agreed to adopt “level one” scrutiny in relation to the Bill and did not therefore take oral evidence or produce a report; however it did seek written evidence from relevant parties¹⁵⁷. Responses were received from the Parole Board of Scotland, the Scottish Court Service and the SCCRC. The relevant correspondence is included in Annexe A.

232. Neither the Parole Board for Scotland or the Scottish Court Service highlighted any concerns in relation to the Financial Memorandum.¹⁵⁸

233. Nevertheless, the SCCRC raised concerns about its current financial position and questioned whether it could meet the costs associated in the Bill without either additional funding or a reduction in service levels—

“At a time when the Commission is experiencing its highest case volume since it was established in 1999, meeting this level of additional cost [ie possible disclosure of the Megrabi statement] within a significantly reduced budget would present extreme difficulties for the SCCRC. It will result in further backlogs to cases awaiting initial review and/or increased review times as well as possibly fundamental changes to the structure of the organisation.

¹⁵⁵ Scottish Parliament Subordinate Legislation Committee. 7th Report, 2012 (Session 4).

¹⁵⁶ Criminal Cases (Punishment and Review) (Scotland) Bill. Financial Memorandum. Available at: [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20\(Punishment%20and%20Review\)%20\(Scotland\)%20Bill/Ex_Notes_and_FM.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Cases%20(Punishment%20and%20Review)%20(Scotland)%20Bill/Ex_Notes_and_FM.pdf)

¹⁵⁷ The Finance Committee wrote to the Law Society of Scotland, the Faculty of Advocates, the Scottish Court Service, the Scottish Prison Service, the Parole Board for Scotland and the Scottish Criminal Cases Review Commission.

¹⁵⁸ The Scottish Criminal Cases Review Commission. Written submission to the Finance Committee, paragraph 9.

“With regard to the potential costs associated with any legal action following the consideration of the appropriateness of disclosure by the SCCRC, no specific financial provision has been discussed or agreed with the Scottish Government. An undertaking would need to be provided by the Scottish Government that costs associated with this type of legal challenge would be met through a direct increase in funding to the SCCRC.”¹⁵⁹

234. The SCCRC also commented on the difficulty in estimating the costs associated with any potential legal challenge being raised by affected persons should it decide to disclose information in the case of Mr Megrahi. The figure in the Financial Memorandum was based on a recent case where the SCCRC defended a legal challenge. The cost to the SCCRC in that case was £9,000 so the cost of legal challenges to any release of information related to Part 2 of the Bill is estimated as being between £36,000 and £72,000. In its response to the Finance Committee, the SCCRC said—

“It is extremely difficult to assess whether this is an appropriate benchmark and likewise it is extremely difficult to anticipate the potential number of legal challenges which might be raised.”

235. The Justice Committee acknowledges the difficulties involved in estimating the financial implications of Part 2 of the Bill. In this connection, we note the lack of certainty as to whether the SCCRC are likely to exercise any power to disclose in cases in the future other than the Megrahi case. As regards the Megrahi case, recent events involving the actions of a Scottish newspaper may now have put to rest the SCCRC’s financial concerns, but it would be helpful to have this expressly clarified.

236. The Committee would welcome a response from the Scottish Government to the financial concerns raised by the SCCRC, and on whether the Scottish Government considers that these have been superseded by recent events.

¹⁵⁹ The Scottish Criminal Cases Review Commission. Written submission to the Finance Committee, paragraphs 13-14.

ANNEXE A: FINANCE COMMITTEE CONSIDERATION

Written submissions received on the Financial Memorandum of the Criminal Cases (Punishment and Review) (Scotland) Bill

SUBMISSION FROM SCOTTISH COURT SERVICE

Consultation

1. Did you take part in the Scottish Government's consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

The Scottish Court Service did not participate in the consultation exercise. However, we have liaised with Scottish Government on the financial implications arising from the Bill.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Our views on the potential costs arising from the Bill are reflected in the Financial Memorandum

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum accurately reflects the financial implications for the Scottish Court Service.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Provided that the number of cases is as projected in the Financial Memorandum, then we would expect that the Scottish Court Service would be in a position to absorb the additional work.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

We have no reason to doubt the projections made in the Financial Memorandum

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We are unaware of any related wider policy initiative.

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

We are unaware of any further related costs.

SUBMISSION FROM SCOTTISH CRIMINAL CASES REVIEW COMMISSION

1. The Scottish Criminal Cases Review Commission (“the SCCRC”) welcomes the opportunity to provide written evidence to the Finance Committee on the Criminal Cases (Punishment and Review) (Scotland) Bill: Financial Memorandum. This response is restricted to the issues and questions raised in respect of the Financial Memorandum contained within the Explanatory Notes and relating specifically to Part 2 of the Bill concerning the disclosure of information obtained by the SCCRC.

2. The SCCRC has given careful consideration to the questions posed by the Finance Committee and at the same time has also provided written evidence to the Justice Committee on the Bill itself. Before answering those questions, the SCCRC would reiterate that it is agreeable to the publication of the Statement of Reasons in the case of Abdelbaset Ali Mohamed Al Megrahi (“the SOR”), but that it is not empowered to do so and can do so only with the cooperation of both the Scottish and the UK Governments and certain foreign authorities.

3. Whilst the SCCRC welcomes the provision of such a “framework”, it questions whether it is necessary to incorporate such a framework into an Act of the Scottish Parliament. Incorporating this level of detail for such a restricted matter into what is the principal Criminal Procedure Act in Scotland seems unnecessarily complicated and bureaucratic. The SCCRC is of the view that a distinct Act, rather than an amendment to the 1995 Act, would be a simpler and cleaner solution.

4. These general comments in relation to the Bill are more fully explored within the SCCRC’s response to the Justice Committee. With these in mind, the SCCRC answers the questions posed under the Financial Memorandum to the Bill as follows:-

Consultation

Question 1: Did you take part in the Scottish Government’s consultation exercise for the Bill and, if so, did you comment on the financial assumptions made?

5. **Yes.** The SCCRC has been involved in ongoing consultation with the Scottish Government concerning the Bill and the financial assumptions made within the

Financial Memorandum within the Explanatory Notes. This process commenced on 2 September 2011.

Question 2: Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

6. **Yes.** The financial assumptions used within the Financial Memorandum from paragraphs 57 to 60 were based on the information provided by SCCRC as part of the consultation. The financial assumptions used in paragraph 61 have been developed using the information provided by SCCRC and, as reflected within the Financial Memorandum, SCCRC would reiterate that it is difficult to provide any certainty in frequency or cost of either applicable cases or any subsequent legal challenges.

Question 3: Did you have sufficient time to contribute to the consultation exercise?

7. **Yes.** No specific deadlines were stipulated as part of this consultation process and the SCCRC was able to supply Law Reform Division with all relevant background information and opinion in a timely manner.

Costs

Question 4: If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

8. **Yes.** The Financial Memorandum has direct financial implications for the SCCRC, particularly, as set out within the Financial Memorandum, in respect of the case of Mr Megrahi which is one of three cases meeting the criteria within Part 2 of the Bill i.e. cases involving conviction which have been referred by the SCCRC and then an appeal based on the referral has subsequently been raised and then abandoned, or has fallen.

9. The Financial Memorandum accurately identifies where there will be financial implications for the SCCRC namely - in the consideration of whether it is appropriate to disclose information in these specific cases in line with the framework established by the Bill and - as a result of possible subsequent legal action in respect of any decision to disclose made by the SCCRC.

10. In respect of the costs associated with considering the appropriateness of disclosing information, the SCCRC based its financial assumptions and projections on the case of Mr Megrahi. It assessed the timescale to consider the appropriateness of disclosure in the case to be approximately 12 months and the cost within the period to be approximately £116,000. As set out in 6 above, the Financial Memorandum is based upon the information provided by the SCCRC as part of the consultation process and is therefore accurate.

11. There are a further two cases which meet the criteria in Part 2 of the Bill. The costs associated with considering disclosure in these cases is considered to be

significantly less given the relatively straight forward nature of the cases and the number of affected parties in each. 12. In respect of the costs associated with any potential legal action being raised by affected parties in relation to the SCCRC's decision on disclosure, the benchmark used in the Financial Memorandum was based on the most recent cost to the SCCRC of defending a legal challenge to a decision not to refer and this was approximately £9,000. It is extremely difficult to assess whether this is an appropriate benchmark and likewise it is extremely difficult to anticipate the potential number of legal challenges which might be raised. Paragraph 61 of the Financial Memorandum attempts to develop an estimate of the likely number of legal challenges and the subsequent overall cost in the case of Mr Megrahi arising from legal challenges. This has been undertaken using the benchmark figure provided by the SCCRC in paragraph 60 and the SCCRC would further reiterate the difficulty in providing such an estimate given the levels of uncertainty.

Question 5: Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

13. **No.** As part of the consultation process and development of the draft Bill the SCCRC provided the Scottish Government with a full assessment of the estimated costs to be incorporated within the Financial Memorandum, as discussed above. Following the 2011 Comprehensive Spending Review, the SCCRC was provided with a 3-year reduced budget for the period 2012-15 and was told that the costs associated with considering the appropriateness of disclosure in the case of Mr Al-Megrahi following the passing of the Bill would need to be met within this budget. At a time when the Commission is experiencing its highest case volume since it was established in 1999, meeting this level of additional cost within a significantly reduced budget would present extreme difficulties for the SCCRC. It will result in further backlogs to cases awaiting initial review and/or increased review times as well as possibly fundamental changes to the structure of the organisation.

14. With regard to the potential costs associated with any legal action following the consideration of the appropriateness of disclosure by the SCCRC, no specific financial provision has been discussed or agreed with the Scottish Government. An undertaking would need to be provided by the Scottish Government that costs associated with this type of legal challenge would be met through a direct increase in funding to the SCCRC.

Question 6: Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and timescales over which such costs would be expected to rise?

15. **Yes.** The Financial Memorandum does accurately reflect the margins of uncertainty regarding both financial estimates and timescales. The focus on the case of Mr Megrahi is appropriate given the unique nature of this case and the significant costs in this instance resulting from the large number of affected parties and the administrative process involved in considering the appropriateness of disclosure.

However, the complexity of this case clearly means that the review may take longer than the estimated 12 months contained within the Financial Memorandum and as a result the associated costs would increase. The Commission believes that it is extremely important to stress the level of uncertainty associated with these estimates and timescales and is of the view that given the levels of uncertainty, particularly in respect of the case of Mr Megrahi, both the timescales and costs associated with this case could increase significantly.

16. The Financial Memorandum also sets out the clear difficulties in estimating both the frequency and cost of any legal action arising. The SCCRC would reiterate the potential problems with the benchmark used and the uncertainties regarding frequency of action when this issue has not been encountered before.

Wider Issues

Question 7: If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

17. **Yes.** The SCCRC considers that the Financial Memorandum clearly sets out the infrequency of cases arising which meet the criteria in Part 2 of the Bill i.e. a total of three cases since the SCCRC was established in April 1999. The SCCRC does not anticipate that this frequency is likely to increase in the future. The SCCRC is not aware of the Bill being part of a wider policy initiative.

Question 8: Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

18. **Yes.** The SCCRC considers that the future costs of the Bill will be limited to the consideration of any other cases meeting the criteria within Part 2 of the Bill. As set out above and within the Financial Memorandum the likely costs associated with future cases, compared with the case of Mr Megrahi, are likely to be relatively insignificant. However, it is extremely difficult to quantify the number of future cases or estimate the costs associated with these in advance. The SCCRC is unaware of any future subordinate legislation or more developed guidance which would result in future costs.

SUBMISSION FROM PAROLE BOARD FOR SCOTLAND

The Bill does not have any financial implications for us. These cases will appear before the Board at some stage anyway so there should be no impact on workload or costs.

Can I just point out an error in your paper in relation to cases coming before the Board. In the last sentence of the first indented paragraph on page 2 you state that "What is likely to change as a result of the Bill's provision is the point at which some non-mandatory life prisoners are able to apply for parole....."

It is important to note that prisoners do not apply for parole. The cases are referred by Scottish Ministers to the Board at the relevant point in their sentence. It is more accurate to say ***the point at which some non-mandatory prisoners will be eligible to have their cases considered for parole.***

ANNEXE B: SUBORDINATE LEGISLATION COMMITTEE REPORT

Criminal Cases (Punishment and Review) (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 24 January and 7 February 2012, the Subordinate Legislation Committee considered the delegated power provisions in the Criminal Cases (Punishment and Review) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Justice Committee as lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

OVERVIEW OF THE BILL

3. The Criminal Cases (Punishment and Review) (Scotland) Bill was introduced in the Scottish Parliament on 30 November 2011. It is a Government Bill which seeks to make provision in two areas.

4. First, it amends the law governing the period of time which prisoners given a discretionary life sentence or order for lifelong restriction (“OLR”) must serve before they become eligible to apply for parole. This part of their sentence is known as the “punishment part” and it is intended to represent the period imposed for the purposes of retribution and deterrence, and to reflect society’s abhorrence of the crime. The remaining part of the sentence reflects the need to protect the public. Once the punishment part has been served, it is for the Parole Board to keep under review the question of whether the prisoner requires to continue to be detained for the protection of the public. If the Board determines that this is no longer necessary, the prisoner will be released on life licence.

5. The Bill also enables the Scottish Criminal Cases Review Commission to determine whether it is appropriate to release information about cases which it has referred to the High Court when those appeals are subsequently abandoned before being determined.

6. In the consideration of the Bill at its meeting on 24 January, the Committee agreed to write to the Scottish Government to raise questions on both of the delegated powers in the Bill.

7. This correspondence is reproduced in the Annexe.

Delegated powers provisions

Section 2 – Ancillary provision

Section 2(1) – power to make supplemental, incidental, consequential, transitional, transitory or saving provision

8. Section 2 confers power to make supplemental, incidental, consequential, transitional, transitory or saving provisions, if the Scottish Ministers consider that it is *necessary or expedient* for the purposes of, or in connection with, section 1.

9. Section 1 of the Bill amends the existing rules applicable to the setting of the punishment part, which are found in Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (“the 1993 Act”). It also amends the equivalent rules in Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007 (“the 2007 Act”), which is not yet in force but is intended to replace the 1993 Act. Section 2(2) further provides that regulations under section 2 may (*in particular*) modify Part 1 of the 1993 Act or Part 2 of the 2007 Act.

10. The Committee asked the Scottish Ministers whether it was intended that regulations under section 2 might modify any primary legislation, or whether the power was restricted to modification of the two enactments expressly mentioned in subsection (2). It also asked whether the Ministers’ intention was clear from the drafting as it presently stands.

11. In their reply, the Scottish Ministers indicate that they consider regulations made under section 2 may only modify the two named enactments. They point out that, indeed, it is only specified Parts of these enactments which may be amended, and that they contain the provisions which section 1 of the Bill amends.

12. The Ministers also argue that, as the power in section 2 may only be exercised “for the purposes of, or in connection with, section 1 [of the Bill]”, this would prevent modification of any enactment other than the Parts of the 1993 and 2007 Acts which are specified in subsection (2). They advise that they do not consider there to be any other legislation in the subject area which would ever require to be amended using the power.

13. However, the Ministers appear to concede that it is at least arguable that an interpretation other than their favoured one is possible, and that it may theoretically be possible to modify other enactments, subject always to the test set out in subsection (1): any provision made must be necessary or expedient for the purpose of or in connection with the changes to the rules on setting punishment parts made by section 1.

14. The Committee takes the view that it is undesirable for there to be two competing potential views on the scope of this power, and if this is considered by the Scottish Government to be a real possibility then it may be something which it wishes to review. Nevertheless, the Committee recognises that the scope of the power is appropriately limited by subsection (1).

15. Given the effect that provisions made under this power could have on individual cases, and that the power can be used to modify primary legislation, the Committee considers that the affirmative procedure is an appropriate level of scrutiny.

16. The Committee therefore draws to the attention of the lead Committee the response of the Scottish Government in relation to the effect of section 2(2).

17. The Committee considers that the effect of this power is sufficiently significant that the affirmative procedure is appropriate.

Section 5 – Commencement

Section 5(3) – commencement and ancillary provision on commencement

18. Section 5 provides a power to commence sections 1 to 4. Sections 5 and 6 come into force on the day after Royal Assent. The power to commence includes the power to make transitional, transitory or saving provision.

19. An order made under section 5, whether simply commencing provisions, or whether also making transitional, transitory or saving provision, is only required to be laid before the Parliament. It is not subject to further parliamentary scrutiny.

20. The Committee asked the Scottish Ministers what sort of transitional, transitory or saving provision they envisaged might be required, and whether this could be complex or cause practical problems in implementation.

21. The Scottish Ministers explain that they do not, at this stage, envisage making substantial transitional, transitory or savings provisions using this power. They advise that, if such provisions are needed for Part 1 of the Bill, they are likely to be made under the power in section 2 (and so be subject to the affirmative procedure). Furthermore, they consider it unlikely that any provisions of this type will be needed for the commencement of Part 2 of the Bill.

22. However, the Scottish Ministers state that they wish to have the power in case any unexpected ancillary provision is needed in connection with commencing Part 2 of the Bill. They also indicate that, if straightforward provisions are needed for Part 1, they could be included. Given the immediately preceding view that ancillary provision for Part 1 is *likely* to be made under section 2, the Committee assumes that this power would only be relied upon for minor matters in relation to Part 1.

23. The Committee, having considered this explanation from the Scottish Government, is content with the order making power under section 5, which provides for commencement and ancillary provision on commencement, and is content that it is not subject to parliamentary procedure beyond the default laying requirement.

Appendix

Response from the Scottish Government

Criminal Cases (Punishment and Review) (Scotland) Bill

Thank you for your letter of 24 January 2012 to Tim Ellis in relation to the Criminal Cases (Punishment and Review) (Scotland) Bill. I am replying on behalf of the Scottish Government as the Bill Team leader.

For ease of reference, the Committee's comments are copied below followed by our response to each of the points raised.

Subordinate Legislation Committee comments on section 2 – ancillary provision

The Committee asked the Scottish Government to confirm:-

- *Whether it is intended that regulations under section 2 may modify any primary legislation, or whether it is intended that they may only modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons Scotland Act 2007; and*
- *Whether this is clear from section 2(2) as presently drafted.*

Scottish Government response

It is the Scottish Government's position that regulations made under section 2 of the Bill will only be able to modify Part 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 and Part 2 of the Custodial Sentences and Weapons (Scotland) Act 2007.

Those Acts are mentioned expressly in section 2(2) because those are the ones the Bill is seeking to amend in the first place. The references to the two Acts are very specific. They refer to single Parts of those Acts, not the whole of each Act. Accordingly, our view is that such a narrow specificity would tend, on a normal reading, to exclude any other Act, or Part of an Act, from modification.

Further, the words "for the purposes of or in connection with section 1" in section 2(1) tie the power closely to the amendments already being made by the Bill. If another Act cannot be reasonably stated to relate sufficiently to that purpose, then in our view this would exclude modification, even if it could be argued theoretically that the specific references to single Parts in section 2(2) do not exclude modification of another Act or Part. In this regard, it is important to note that we do not consider that there is any further legislation in the relevant subject area that would ever require to be amended using this power.

We would therefore contend that it is clear from the present drafting approach that the powers contained in section 2 are limited in their scope.

Subordinate Legislation Committee comments on section 5 – commencement and ancillary provision on commencement

Further, the Committee asked the Scottish Government what sort of provision is envisaged may be required and whether this could be complex or cause practical problems in implementation.

Scottish Government response

Part 1 of the Bill deals with a complex area of law. It is likely that any substantial transitional, transitory or saving provisions in connection with Part 1 will be made under the power in section 2 of the Bill and that the relevant instrument(s) will therefore be subject to the affirmative procedure.

It is unlikely that any transitional, transitory or saving provision will be required to commence Part 2 of the Bill, as this creates new, stand alone provisions.

The power in section 5(3) is, however, considered desirable so as to allow any unexpected ancillary provision in connection with the commencement of Part 2 to be included within a commencement order. A commencement order could also include any straightforward transitional, transitory or saving provision in connection with the commencement of Part 1 which it was not for any reason thought appropriate to include within section 2 regulations.

Philip Lamont
Criminal Cases (Punishment and Review) Bill Team Leader
31 January 2012

ANNEXE C: EXTRACTS FROM THE MINUTES

17th Meeting, 2011 (Session 4) Tuesday 6 December 2011

Work programme (in private): The Committee considered its work programme, including its approach to the Criminal Cases (Punishment and Review) (Scotland) Bill. The Committee agreed: (a) to issue a general call for written evidence on the Bill and to further consider at its next meeting the proposed timetable for consideration of the Bill and possible witnesses[. . .].

18th Meeting, 2011 (Session 4) Tuesday 13 December 2011

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee further considered its approach to its scrutiny of the Bill at Stage 1 and agreed (1) its proposed outline timetable for consideration of the Bill; (2) initial witnesses; and (3) to write to the Cabinet Secretary for Justice seeking clarification on aspects of Part 2 of the Bill.

4th Meeting, 2012 (Session 4) Tuesday 31 January 2012

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Michael Meehan, Member of the Criminal Law Committee, Law Society of Scotland;

James Wolffe QC, and Joanna Cherry QC, Faculty of Advocates;

Gerard Sinclair, Chief Executive, and Michael Walker, Senior Legal Officer, Scottish Criminal Cases Review Commission.

The Convener declared that she is a member of the Justice for Megrahi campaign and Roderick Campbell declared that he is a member of the Faculty of Advocates.

5th Meeting, 2012 (Session 4) Tuesday 7 February 2012

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Robert Forrester, Iain McKie, Len Murray, and Dr Jim Swire, Justice for Megrahi;

Sir Gerald Gordon QC;

James Chalmers, Senior Lecturer, University of Edinburgh School of Law;

Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), Information Commissioner's Office.

The Convener declared that she is a member of the Justice for Megrahi campaign.

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered the evidence received and agreed to invite a witness to speak to human rights aspects in relation to Part 1 of the Bill at a future meeting.

6th Meeting, 2012 (Session 4) Tuesday 21 February 2012

Criminal Cases (Punishment and Review) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Kenny MacAskill, Cabinet Secretary for Justice.

The Convener declared that she is a member of the Justice for Megrabi campaign. The Committee agreed to write to the UK Secretary for Justice, the Scottish Criminal Cases Review Commission and the Information Commissioner seeking further information on issues relating to the Data Protection Act 1998.

7th Meeting, 2012 (Session 4) Tuesday 28 February 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence received on Part 1 of the Bill at Stage 1 in order to inform the drafting of its report. The Committee agreed to write to the Scottish Human Rights Commission concerning human rights issues in relation to Part 1.

8th Meeting, 2012 (Session 4) Tuesday 6 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee agreed to defer consideration of the main themes arising from the evidence received on Part 2 of the Bill at Stage 1 to a future meeting. The Committee also agreed to seek an extension to the timetable for completion of Stage 1.

10th Meeting, 2012 (Session 4) Tuesday 20 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence received on Part 2 of the Bill at Stage 1 in order to inform the drafting of its report.

11th Meeting, 2012 (Session 4) Tuesday 27 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed to consider a revised draft report in private at its next meeting on 28 March 2012.

12th Meeting, 2012 (Session 4) Tuesday 28 March 2012

Criminal Cases (Punishment and Review) (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 report. Various changes were agreed to and the Committee agreed its report on the Bill.

ANNEXE D: INDEX OF ORAL EVIDENCE

[4th Meeting, 2012 \(Session 4\) Tuesday 31 January 2012](#)

Michael Meehan, Member of the Criminal Law Committee, Law Society of Scotland;
James Wolffe QC, and Joanna Cherry QC, Faculty of Advocates;
Gerard Sinclair, Chief Executive, and Michael Walker, Senior Legal Officer, Scottish Criminal Cases Review Commission.

[5th Meeting, 2012 \(Session 4\) Tuesday 7 February 2012](#)

Robert Forrester, Iain McKie, Len Murray, and Dr Jim Swire, Justice for Megrahi;
Sir Gerald Gordon QC, and James Chalmers, Senior Lecturer, University of Edinburgh School of Law;
Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), Information Commissioner's Office.

[6th Meeting, 2012 \(Session 4\) Tuesday 21 February 2012](#)

Kenny MacAskill, Cabinet Secretary for Justice.

ANNEXE E: INDEX OF WRITTEN EVIDENCE

Evidence received in alphabetical order

[Association of Chief Police Officers in Scotland \(124KB pdf\)](#)

[Berkley, Matt \(157KB pdf\)](#)

[Chalmers, James \(86KB pdf\)](#)

[Chalmers, James \(supplementary submission\) \(74KB pdf\)](#)

[Faculty of Advocates \(163KB pdf\)](#)

[Gordon, Sir Gerald \(75KB pdf\)](#)

[Information Commissioner's Office \(127KB pdf\)](#)

[Information Commissioner's Office \(supplementary submission\) \(120KB pdf\)](#)

[Justice for Megrahi \(83KB pdf\)](#)

[Justice for Megrahi \(supplementary submission\) \(8KB pdf\)](#)

[Law Society of Scotland \(120KB pdf\)](#)

[Scottish Criminal Cases Review Commission \(201KB pdf\)](#)

[Scottish Criminal Cases Review Commission \(supplementary submission\) \(77KB pdf\)](#)

[Scottish Criminal Cases Review Commission \(second supplementary submission\) \(95KB pdf\)](#)

Written submissions are also published (in the order received) on the Committee's webpage at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/46392.aspx>

Correspondence on the Bill is available on the Committee's webpage at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/45108.aspx>

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